TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 627

PUBLIC SERVICE COMMISSION OF MONTANA, TOM STOUT, THOMAS E. CAREY, ET AL., ETC., APPELLANTS,

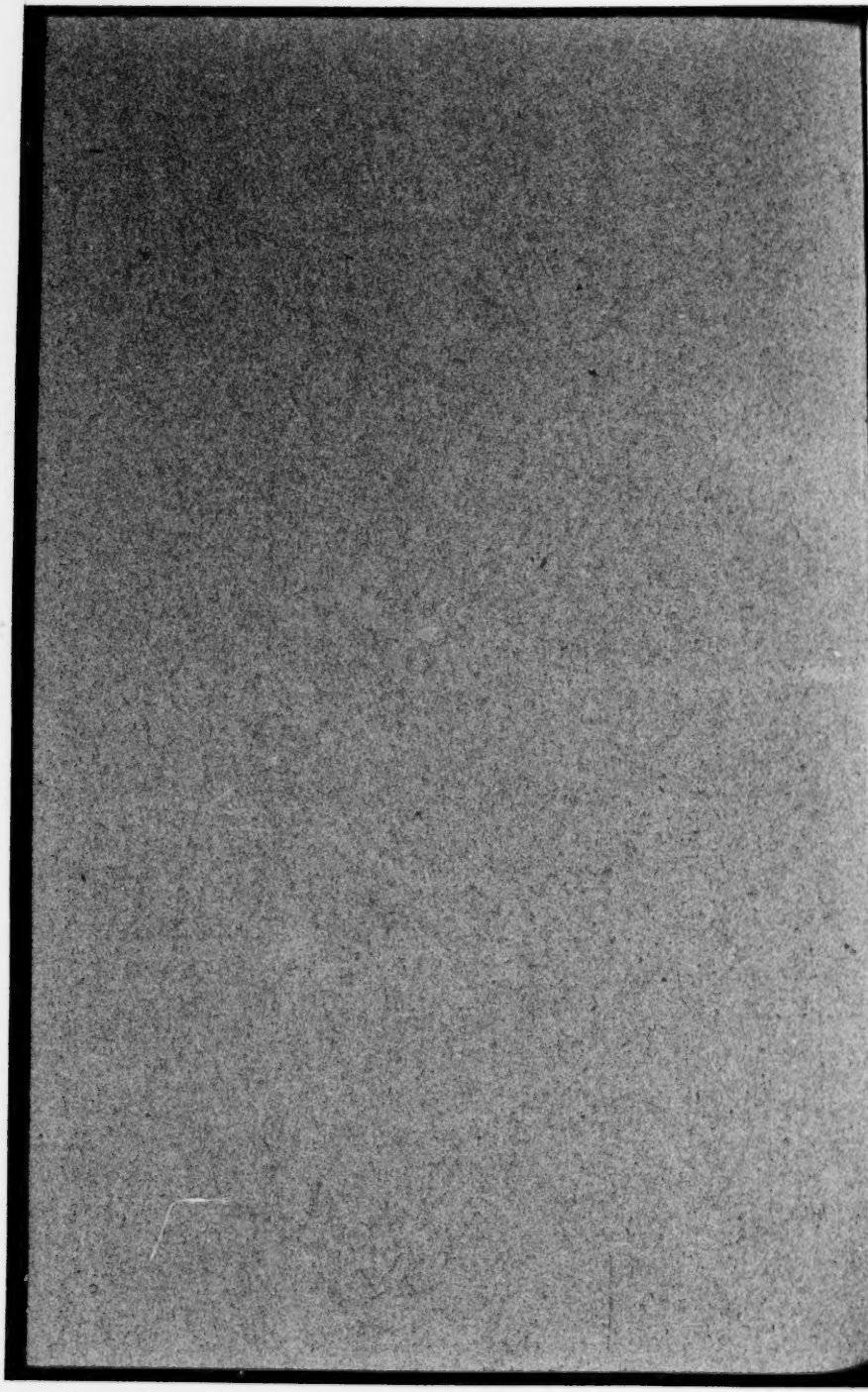
vs.

GREAT NORTHERN UTILITIES COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

FILED JANUARY 14, 1933

(37,324)



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[fol. 3]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

GREAT NORTHERN UTILITIES COMPANY, Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA, DAN BOYLE, LEE DENNIS, and LEONARD YOUNG, Members of said Commission, and L. A. Foot, Attorney General of the State of Montana, Defendants

BILL OF COMPLAINANT—Filed Dec. 22, 1930

To the Honorable the Judges of the District Court of the United States for the District of Montana:

Great Northern Utilities Company, a corporation, created, organized, and existing under and by virtue of the laws of the State of Montana, brings this, its bill of complaint, against the defendants above named, and thereupon complains and alleges:

I

That this is a suit of a civil nature, arising under the constitution of the United States, particularly under the Fourteenth Amendment thereto, and involves, exclusive of interest and costs, more than Three Thousand ($3,000.00) Dollars.

II

That the plaintiff is, and has been since prior to the year 1923, a corporation, organized and existing under and by virtue of the laws of the State of Montana.

[fol. 4] III

That the defendants, Dan Boyle, Lee Dennis and Leonard Young, are and have been since prior to the year 1928, the duly elected, qualified, and acting Railroad Commissioners of the State of Montana, and ex officio members of the Pub-

lic Service Commission of the State of Montana, and are residents and citizens of said State.

IV

That the defendant, L. A. Foot, is the duly elected, qualified, and acting Attorney General of the State of Montana, and a resident and citizen of said state.

V

That the Citizens Gas Company is and has been, since prior to the year 1928, a corporation, organized and existing under and by virtue of the laws of the State of Montana.

VI

That the city of Shelby is, and has been since prior to the year 1922, a municipal corporation, created, organized and existing under and by virtue of the laws of the State of Montana.

VII

That on the 16th day of October, 1922, the City Council of the City of Shelby passed an ordinance known and designated as Ordinance No. 82, which was approved by the Mayor of said city, a copy of which is hereto attached and made a part of this bill of complaint as Exhibit "A".

VIII

That thereafter and on the 2nd day of January, 1923, Forest P. Williams, the grantee named in said ordinance, sold, assigned and transferred to the plaintiff herein, the franchise granted by said ordinance and all rights, privileges, and benefits conferred thereby, and this plaintiff is now and ever since has been the owner thereof.

[fol. 5]

IX

That the franchise granted by said ordinance was, within ninety (90) days after the passage and approval thereof, accepted by the grantee therein named by filing with the City Clerk of the City of Shelby a writing expressly accepting said franchise, and the said Forrest P. Williams, plaintiff, and the herein — as his assignee and successor, have

duly performed all of the terms and conditions of said ordinance on the part of the grantee therein named to be kept and performed.

X

That this plaintiff, in the exercise of the franchise so granted, in the year 1923, constructed in the said City of Shelby a plant or system for furnishing and supplying natural gas to the said city and inhabitants thereof for lighting and heating purposes, and in the construction of said plant or system expended a large sum of money in excess of the sum of Fifty Thousand ($50,000.00) Dollars, and engaged in the business of furnishing and supplying natural gas in said city at rates approved by the Public Service Commission of Montana.

XI

That the City of Shelby has, and has had for the past year, a population of approximately 2500 people, and the plant or system so constructed by this plaintiff was designed and intended to supply natural gas to said city and all of its inhabitants in such quantities as then required and as might be required by the future population of said city, and said plant or system is of ample capacity to furnish such supply and this plaintiff now has and has had, ever since the commencement of the operation of its plant and system, an ample supply of natural gas for said city and its inhabitants and will continue to have such supply available for the present and future needs and requirements of all the people of said city.

[fol. 6]

XII

That on the 10th day of January, 1927, the City Council of said City passed an ordinance, designated and known as Ordinance No. 108, approved by the acting Mayor of said city, a copy of which is hereto attached and made a part hereof as Exhibit "B".

XIII

That the Citizens Gas Company, claiming to be the assignee of and to have succeeded to the franchise and all the rights, privileges and benefits granted and conferred by said Ordinance, No. 108, in the latter part of the year 1928,

in the pretended exercise of said franchise, constructed a plant or system for the furnishing and supplying of natural gas for lighting and heating purposes in said city, which said plant or system is a duplication of the plant or system of this plaintiff to the extent of approximately two-thirds of the plant and system of this plaintiff, and was constructed and intended to serve and furnish natural gas to the patrons and customers of this plaintiff as well as others who would become patrons and customers of this plaintiff except for the construction of said competing system or plant. Said Citizens Gas Company is continuously enlarging and extending its distribution system and will continue to do so until its system will be a complete duplication of the system of this plaintiff.

XIV

That the said gas plant or system of the Citzens Gas Company was constructed and is being operated in competition with the plant or system of this plaintiff, and said Commission has approved or concurred in a schedule of rates for the furnishing and supplying of gas from said plant or system proposed by said Citizens Gas Company, as follows:

			Net
First	10,000 cubic feet per month	35c	per M. cu. ft.
Next	10,000 " " " "	30c	" " " "
Next	30,000 " " " "	27½c	" " " "
Next	250,000 " " " "	25c	" " " "
All over	300,000 " " " "	22½c	" " " "

[fol. 7]

XV

That the population of said City of Shelby and the demands for natural gas therein are wholly insufficient to support and maintain both of said plants or systems, and such condition will continue indefinitely in the future, all of which was well known to said Citizens Gas Company prior to and at the time of the construction of its plant or system. That said Citizens Gas Company, knowing that it could not survive and continue to operate without securing for itself the patrons and customers of this plaintiff, proposed and had approved a schedule of rates, as aforesaid, and thereby and through solicitation prevailed upon and induced more than 100 of the patrons and customers

of this plaintiff to cease purchasing gas from this plaintiff and become its patrons and customers.

XVI

That at the time of the construction and operation of said system by said Citizens Gas Company, this plaintiff was supplying and furnishing gas to the people of said city in quantities desired, according to a tariff or schedule of rates, approved by said Public Service Commission, as follows:

		Net
First	10,000 cu. ft. per month per meter	50c per M. cu. ft.
Next	10,000 cu. ft. per month per meter	45c per M. cu. ft.
Next	30,000 cu. ft. per month per meter	40c " " " "
Next	250,000 cu. ft. per month per meter	35c " " " "
All over	300,000 cu. ft. per month per meter	30c " " " "

Minimum Bill: $1.50 per month per meter.
Prompt Payment discount: None.

XVII

That the said Citizens Gas Company commenced the operation of its plant or system and the distribution of natural gas in said city in the month of October, 1928, and at that time this plaintiff was furnishing and supplying natural gas to 485 customers or patrons, and within a brief period after the Citizens Gas Company commenced the operation of its plant or system and the furnishing and distribution of gas at the rates approved by the Public Service Commission of [fol. 8] Montana as aforesaid, 137 of the patrons or customers of this plaintiff ceased to purchase gas from this plaintiff and became patrons or customers of the said Citizens Gas Company.

XVIII

That this plaintiff, to prevent the loss of all of its customers or patrons, and to protect and preserve its investment in its gas plant or system, on the 8th day of November, 1928, proposed and filed with the Public Service Commission a tariff or schedule of rates, providing 25¢ per thousand cubic feet for all consumption up to three hundred thousand (300,000) cubic feet, and 20¢ per thousand cubic feet for all quantities over three hundred thousand (300,000) cubic feet, and on November 19, 1928, this plaintiff proposed and filed with said Public Service Commission a

tariff or schedule of rates, designated by said Commission as "Schedule 4-A", providing 20¢ per thousand cubic feet up to three hundred thousand (300,000) cubic feet and 15½ per thousand cubic feet for all over three hundred thousand (300,000) cubic feet.

XIX

That, upon the filing of said Schedule 4-A, the Citizens Gas Company presented to and filed with said Public Service Commission a complaint and protest against said Schedule 4-A, upon the grounds that the rates thereby proposed were "unfair, unjust and unreasonable" to said company. That a hearing was ordered and held by the said Public Service Commission, upon its own motion, at the City of Shelby, on December 20, 1928, for the purpose of determining the reasonableness and justness of the rates proposed by this plaintiff by said schedule, designated as Schedule 4-A. At said hearing the citizens Gas Company and twelve customers or patrons of said company appeared claiming and contending that said rates so proposed were not remunerative or proposed in good faith but as competitive rates. This plaintiff presented evidence in support and justification of said rates under the said conditions [fol. 9] and circumstances, then existing in the City of Shelby, and thereafter, and on January 22, 1929, the said Public Service Commission, Commissioner Young dissenting, made and issued its order, a copy of which is hereto attached and made a part hereof as Exhibit "C".

XX

That said Commission was and is without authority or jurisdiction to fix or establish such minimum rates or to require this plaintiff to adopt or charge rates according to the schedule provided in said order and thereby increase the rates specified in "Schedule 4-A", which rates this plaintiff was, at the time of the making of said order and ever since has been, charging, and the effect of said order is to deprive this plaintiff of the right of competition, for the purpose of retaining its patrons and customers and for the protection and preservation of its investment in said gas plant or system, and to deprive this plaintiff of its property, consisting of said gas plant and system and

of its right and liberty to contract for the furnishing of gas at the rates prescribed in "Schedule 4-A", without due process of law and to deny plaintiff equal protection of the law, all in violation of the Fourteenth Amendment of the Constitution of the United States.

XXI

That said Commission, in making and promulgating said order, acted without jurisdiction in that there was no evidence introduced before or considered by said Commission showing or tending to show that the rates prescribed thereby are just or reasonable, or that the rates prescribed in said Schedule 4-A are unjust or unreasonable and said order was made arbitrarily and capric-ously, without regard to the public interest and in the interest of and for the purpose of increasing the earnings and enhancing the value of the property of the said Citizens Gas Company, all in violation of the due process of law clause of the said Fourteenth Amendment.

[fol. 10] XXII

That plaintiff has not complied with said order and refuses to comply therewith unless it should be determined and decided in this court that said order is valid and that this plaintiff should comply therewith, in which event this plaintiff will do so unless said Commission, upon a showing then made, approve of rates different from those provided in said order.

XXIII

That the defendants threaten to and will, unless enjoined and restrained from so doing, institute and prosecute actions or proceedings in the courts of said state to enforce compliance with said order of this plaintiff, and for the collection from this plaintiff of the penalties provided for by Section 3908 of the Revised Codes of Montana of 1921.

XXIV

That the penalties provided by said Section 3908 for failure to obey said order by charging the rates therein prescribed are so large and severe that unless the collection

of same is enjoined, plaintiff would be compelled to obey said order, notwithstanding it is convinced that the rates prescribed thereby will ultimately be adjudged and decreed to be unlawful by reason whereof said section denies plaintiff the equal protection of the law and deprives it of its property without due process of law, in violation of said Fourteenth Amendment.

XXV

That the provisions of Section 3906 of the Revised Codes of Montana of 1921 providing that all rates fixed by the Commission shall be deemed reasonable and just and shall remain in full force and effect until final determination of their invalidity by the courts having jurisdiction is in violation of the Fourteenth Amendment to the Constitution of the United States in that the same deprives the plaintiff [fol. 11] of its property and of its right and liberty of contracting for the furnishing of gas, pending the determination of the validity of said rates presented by said order, without due process of law and denies to this plaintiff the equal protection of the laws.

XXVI

That said Commission refused to concur in the rates prescribed in said Schedule 4-A and in so refusing assumed to exercise the power conferred by the provisions of Section 3891 of the Revised Codes of Montana of 1921, declaring "that no advance or reduction of the existing schedules shall be made without the concurrence of the Commission". This provision is violative of the due process of law clause of the Fourteenth Amendment for the reason that it authorizes the Commission arbitrarily and without notice or a hearing or any opportunity for a hearing to refuse to concur in rates less than the rates prescribed by or approved by said Commission, as just and reasonable rates and Section 3892 of said Codes makes it unlawful for this plaintiff to charge, demand, collect or receive a greater or less compensation for any service performed than the rates prescribed by or approved by said Commission.

XXVII

That if said Commission has been authorized or empowered to prescribe minimum rates, or to require the increase

of rates which are less than just and reasonable rates, such authorization is in violation of the due process of law clause of the Fourteenth Amendment for the reason that there are no rules or principles prescribed governing or controlling such Commission in the fixing or determination of such minimum rates, or any rates other than just and reasonable rates, and said order deprives this plaintiff of its property and right and liberty to contract for the furnishing of gas as hereinbefore alleged.

XXVIII

That plaintiff has no plain, speedy or adequate remedy in the ordinary course of the law.

[fol. 12] Wherefore plaintiff prays:

1. That it be adjudged and decreed that the said order and the rates prescribed thereby are illegal and void, as being in violation of the Fourteenth Amendment of the Constitution of the United States, and also in violation of the Public Service Commission Act of Montana.

2. That a writ of preliminary or interlocutory injunction, affective during the pendency of this suit, issue, directed to the said defendants, and each of them, enjoining and restraining them from bringing any action or proceeding whatsoever, to compel obedience to said order by this plaintiff, and also enjoining and restraining them from instituting any action or proceeding to subject this plaintiff to the penalties provided in said Section 3908, or any other statute or law of the State of Montana, for failure to comply with said order, and further enjoining and restraining said defendants from in any manner preventing or interferring with the plaintiff in charging and collecting any rates for gas, not discriminatory, less than the rates prescribed by said order.

3. That a temporary restraining order issue enjoining and restraining the defendants, and each of them, as aforesaid, pending the determination of the application herein for an interlocutory injunction.

4. That upon final hearing, such injunction be made perpetual.

5. That the plaintiff may have all other, proper and equitable relief.

6. That this Honorable Court grant to plaintiff a writ of subpoena to be directed to each of said defendants, commanding them, and each of them, to appear on a day certain [fol. 13] and make answer to this complaint, (but not under oath, answer under oath being expressly waived), and to abide the further order of the court.

Dated this 22nd day of December, A. D. 1930.

Great Northern Utilities Company, by E. G. Toomey,
M. S. Gunn, Gunn, Rasch, Hall & Gunn, Solicitors.

Duly sworn to by H. M. Saubert. Jurat omitted in printing.

[fol. 14] EXHIBIT "A" TO BILL OF COMPLAINT

Ordinance No. 82

An ordinance granting to Forrest P. Williams, his associates and assigns, the right to construct, maintain and operate a plant for the manufacture, sale and distribution of illuminating and fuel gas and their by-products and for the piping and distribution of natural gas and to use the streets, alleys and public places of the city of Shelby therefor.

Be it ordered by the Town Council of the Town of Shelby, Montana:

Section 1. That there be and hereby is granted to Forrest P. Williams, his associates and assigns, hereinafter called the grantee, the right, franchise and privilege for and during the term of forty (40) years from date of the passage and approval of this Ordinance to erect, construct, maintain and operate a complete plant for the manufacture, sale and distribution of illuminating and fuel gas and their by-products and for the piping and distribution of natural gas within the corporate limits of the Town of Shelby, Montana, including each and every addition thereto and the right to excavate and to lay pipes and any necessary appli-

ances for the proper distribution of gas of whatsoever kind in and through all streets, alleys, and public places of the said Town of Shelby, and such additions thereto, or through any extensions of said streets, alleys and public places, and to do all things incident thereto or necessary therefor.

Section 2. All pipes for the distribution of gas shall be so placed and constructed as to not unnecessarily interfere with sewers and water mains. Any excavations made for the purpose of construction, laying, maintaining, replacing, taking up or repairing any underground structures of the grantee, shall be refilled and resurfaced to at least as good condition as prior to such excavation.

Section 3. The rates to be charged for gas of whatsoever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of Montana shall order and determine.

Section IV. The grantee herein shall within ninety (90) days from and after the passage and approval of this franchise, file with the City Clerk a writing expressly accepting this franchise.

Section V. The rights, powers and franchises herein contained shall exist and continue in force and effect for a period of forty (40) years from date of the passage and approval of this ordinance.

Section VI. That it is herein further ordered and ordained by the said City Council that the City Engineer of Shelby, Montana, designate the location of the gas mains and laterals in the streets and alleys within the incorporated limits of the said City of Shelby.

Section VII. This Ordinance and franchise shall take effect and be in full force from and after its passage and approval in the manner provided by law.

Passed and approved this 16th day of October, A. D. 1922.

James A. Johnson, Mayor.

[fol. 15] EXHIBIT "B" TO BILL OF COMPLAINT

Ordinance No. 108

An ordinance granting to the Shelby Oil and Gas Company, its associates and assigns, the right to construct, maintain and operate a plant for the manufacture, sale and distribution of illuminating and fuel gas and their by-products and for the piping and distribution of natural gas and to use the streets, alleys and public places of the city of Shelby therefor.

Be it ordained by the City Council of the City of Shelby, Montana:

Section I

That there be and hereby is granted to the Shelby Oil & Gas Company, its associates and assigns, hereinafter called the grantee, the right, franchise and privilege for and during the term of Forty (40) years from date of the passage and approval of this Ordinance to erect, construct, maintain and operate a complete plant for the manufacture, sale and distribution of illuminating and fuel gas and their by-products and for the piping and distribution of natural gas within the corporate limits of the City of Shelby, Montana, including each and every addition thereto and the right to excavate and to lay pipes and any necessary appliances for the proper distribution of gas of whatsoever kind in and through all streets, alleys and public places of the said City of Shelby, and such additions thereto, or through any extensions of said streets, alleys and public places, and to do all things incident thereto or necessary therefor.

Section II

All pipes for the distribution of gas shall be so placed and constructed as to not unnecessarily interfere with sewers and water mains. Any excavations made for the purpose of construction, laying, maintaining, replacing, taking up or repairing any underground structures of the grantee, shall be refilled and resurfaced to at least as good condition as prior to such excavation.

Section III

The rates to be charged for gas of whatsoever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of Montana shall order and determine.

Section IV

The grantee herein shall within ninety (90) days from and after the passage and approval of this franchise, file with the City Clerk a writing expressly accepting this franchise.

Section V

The rights, powers and franchises herein contained shall exist and continue in force and effect for a period of forty (40) years from date of the passage and approval of this ordinance.

Section VI

That it is herein further ordered and ordained by the said City Council that the City Engineer of Shelby, Montana, designate the location of the gas mains and laterals in the streets and alleys within the incorporated limits of the said City of Shelby.

Section VII

This Ordinance and franchise shall take effect and be in full force from and after its passage and approval in the manner provided by law.

Passed and approved this 10th day of January, A. D. 1927.

H. G. Syster, Acting Mayor.

[fols. 16 & 17] Exhibit "C" to Bill of Complaint

Order

At a session of the Public Service Commission of Montana, held in its office in the Capitol, Helena, Montana, Tuesday, January 22, 1929, present Chairman Boyle and Commissioners Young and Dennis, there regularly came

before the Commission for final action the matters and things involved in Dockets Nos. 991 and 1028, and it appearing that the Commission has this day issued its report herein, which report is hereby referred to and of this order made a part, and that all matters and things involved have been duly investigated, and a public hearing had whereat all persons interested had opportunity to appear and present their respective interests, and now the Commission being fully advised in the premises,

It is ordered that Schedule 4-A, sheet 2, filed by the Great Northern Utilities Company with the Commission on November 19, 1928, stating rates for natural gas service available for all classes of service at Shelby, Toole County, Montana, be not concurred in and that said Schedule 4-A, sheet 2, shall be, and it is hereby disapproved and rejected.

It is further ordered that the Great Northern Utilities Company shall on or before the first day of February, 1929, file with the Commission a Schedule of rates for natural gas service at Shelby, Montana, effective as of February 1, 1929, and until further order of the Commission, which schedule of rates shall be embodied in a tariff known as Tariff No. 4, as follows, to-wit:

First	10,000	cubic	feet	per	month	35c	per	M.	cu.	ft.
Next	10,000	"	"	"	"	30c	"	"	"	"
Next	30,000	"	"	"	"	27½c	"	"	"	"
Next	250,000	"	"	"	"	25c	"	"	"	"
All over	300,000	"	"	"	"	22½c	"	"	"	"

Minimum Bill: $1.50.

It is further ordered that the Secretary shall serve a true copy of this report and order upon each of the parties hereto, and that the same shall be in full force and effect forthwith according to its terms.

Daniel Boyle, Chairman; Lee Dennis, Commissioner, Being and Constituting a Majority of the Public Service Commission of Montana.

Attest, official: Francis A. Silver, Secretary. (Seal.)

Commissioner Young: I dissent. I can not agree with the majority in ordering in the above rates. I am not concerned about the so-called "rate war" in Shelby but am interested in obtaining the very best rates for the consumers, and when a utility voluntarily reduces its rates, as in this instance, I am in favor of giving the customers the bene-

fit of the reduction instead of denying them the relief offered. In my humble opinion, the Public Service Commission Law was not passed to prohibit rate reductions. Therefore, I wish to be recorded as voting for the approval of Schedule 4-A proposed by the utility naming 20 cents per M. cubic feet for the first 300,000 cubic feet, and 15 cents per M. cubic feet for all over, which is almost one hundred per cent lower than the rates ordered established by the majority of the commission.

Leonard C. Young, Commissioner.

[File endorsement omitted.]

[fols. 18 & 19] In United States District Court

Motion to Dismiss Bill of Complaint—Filed Jan. 15, 1931

Come now the Public Service Commission of Montana, Dan Boyle, Lee Dennis and Leonard Young, members of and constituting said Public Service Commission of Montana, and L. A. Foot, as Attorney General of the State of Montana, defendants above-named, and move the Court to dismiss the bill of complaint on file herein on the grounds and for the reasons that the said bill of complaint does not state facts sufficient to constitute a valid cause of action, in equity, or at all.

L. A. Foot, Attorney General of the State of Montana, residing at Helena, Montana; Francis A. Silver, Attorney for the Public Service Commission of Montana, residing at Helena, Montana, Attorneys for Defendants.

Service of the above and foregoing motion to dismiss admitted and receipt of a copy thereof acknowledged this 15 day of January, 1931.

E. G. Toomey, M. S. Gunn, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 20] In United States District Court

Answer—Filed June 29, 1931

Come now the Public Service Commission of Montana, Dan Boyle, Lee Dennis, and Leonard Young, members of

said Commission, and L. A. Foot, Attorney General of the State of Montana, defendants above named, and for answer to the bill of complaint on file herein, admit, deny, and allege:

I

Admit the allegations contained in paragraphs II, III, IV, V, VI, VII, VIII, X, XII, XIV, XVI, XVII, and XXII.

II

Deny that the above-entitled suit arises under the Constitution of the United States or any amendment thereto or involves, exclusive of interest and costs, more than Three Thousand ($3,000.00) Dollars.

III

With reference to paragraph IX of the bill of complaint, admit that the franchise granted by the City of Shelby was accepted by the grantee therein named but except as herein specifically admitted, the defendants deny each and every and all allegations contained in said paragraph IX.

IV

With reference to paragraph XI of the bill of complaint, the defendants say that they believe the allegations thereof to be true.

V

With reference to paragraph XIII of the bill of complaint, the defendants admit that the Citizens Gas Company did, during the latter part of 1928, pursuant to [fol. 21] Ordinance No. 108 of the City of Shelby, Montana, construct a system for furnishing and supplying natural gas to the City of Shelby and the inhabitants thereof for lighting and heating purposes in said city, but as to the other allegations contained in said paragraph XIII, not herein specifically admitted, the defendants allege that they, and each of them, are without knowledge thereof.

VI

As to the allegations contained in paragraph XV of said Bill of Complaint, the defendants, and each of them, allege that they are without knowledge thereof.

VII

As to paragraph XVIII of the bill of complaint, the defendants admit that the plaintiff proposed and filed with the Public Service Commission of Montana the tariffs set forth in said paragraphs, but with respect to other allegations contained in said paragraph, not herein specifically admitted, the defendants, and each of them, allege that they are without knowledge thereof.

VIII

That with respect to the allegations of paragraph XIX of the bill of complaint, the defendants admit that the Citizens Gas Company filed with said Public Service Commission of Montana a complaint and protest as in said paragraph XIX alleged, but in connection therewith the defendants allege that the said complaint of said Citizens Gas Company was by the Public Service Commission of Montana denied and no hearing of any kind or character was held or had thereon; admit that the Public Service Commission of Montana, upon its own motion, held a public hearing at Shelby, Montana, on December 20, 1928, to in- [fol. 22] quire into the reasonableness and justness of the rates proposed by plaintiff in its Schedule 4-A and that at said hearing the Citizens Gas Company and twelve (12) customers thereof appeared before the said Public Service Commission of Montana and contended that said rates proposed by plaintiff were not proposed in good faith; admit that plaintiff presented evidence to said Public Service Commission of Montana; admit that on January 22, 1929, the said Public Service Commission of Montana made and issued its Report and Order, and that the copy of the order attached to bill of complaint herein and marked Exhibit "C" is a true and correct copy of the order, except that the report of the Commission issued in connection with said order and which is made a part thereof is not set forth as a part of Exhibit "C"; but except as hereinabove specifically admitted, the defendants deny each and every and all allegations contained in said paragraph XIX.

IX

The defendants deny that the Public Service Commission of Montana was on said January 22, 1929, or now is

without authority or jurisdiction to fix or establish minimum rates or to require the plaintiff to adopt or charge rates according to the schedules provided in said report and order; deny that the affect of said order is to deprive plaintiff of the right of competition, and deny that plaintiff, as a public utility, has the right of competition; deny that the affect of said order to to deprive the plaintiff of the property or its right and liberty to contract without due process of law or to deny plaintiff equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States or a violation of any other provision of the Constitution of the United States, or at all.

[fol. 23] X

With reference to paragraph XXI of the bill of complaint, defendants deny that said Public Service Commission of Montana in making and promulgating said report and order acted without jurisdiction or that there was no evidence introduced before or considered by said Commission showing, or tending to show, that the rates prescribed are just and reasonable or that the rates proposed in said Schedule 4-A are unjust or unreasonable; deny that said report and order was made arbitrarily or capriciously or without regard to the public interests; deny that said report and order was made in the interest of or for the purpose of increasing the earnings or enhancing the value of the property of the said Citizens Gas Company.

XI

With reference to the allegations of paragraph XXIII of the bill of complaint, defendants admit that they threaten to and will, unless restrained from so doing, institute and prosecute actions or proceedings in the courts of the State of Montana to enforce compliance with said order but defendants deny that they, or either of them, threaten to or will institute and prosecute or institute or prosecute actions or proceedings in the courts of the State of Montana for the collection from plaintiff of the penalties provided for by section 3908 of the Revised Codes of Montana of 1921, during the pendency of any litigation instituted and prosecuted by the plaintiff in any court of competent jurisdiction to test the legality or lawfulness of said order; and in

this connection the defendants allege that at no time since the date of said order, to-wit: January 22, 1929, up to and including the date hereof, to-wit: June 29, 1931, have they, or either of them, instituted or prosecuted or threatened to institute or prosecute any action or proceeding in the courts of the State of Montana, or at all, for the collection [fol. 24] of any penalty or penalties provided for by section 3908 of the revised codes of Montana of 1921, and the defendants, and each of them, further allege that they do not intend to and will not institute or prosecute any action or proceeding in the courts of the State of Montana, or at all, for the collection of any penalty or penalties provided for by section 3908 of the Revised Codes of Montana accruing, or alleged to accrue, during the period elapsing between the effective date of said order, to-wit: February 1, 1929, and the final determination of the validity of said order by a court of competent jurisdiction.

XII

With reference to paragraph XXIV of the bill of complaint, defendants deny that section 3908, Revised Codes of Montana, 1921, denies the plaintiff the equal protection of the law or deprives it of its property without due process of law.

XIII

With reference to paragraph XXV of the bill of complaint, defendants deny that the provision of section 3906, Revised Codes of Montana, 1921, deprives the plaintiff of its property or its right or liberty of contracting for the furnishing of gas, pending the determination of the validity of said rates prescribed by said report and order, without due process of law or that it denies to the plaintiff the equal protection of the law.

XIV

With respect to paragraph XXVI of the bill of complaint, defendants admit that said Commission refused to concur in the rates prescribed in said schedule 4-A and in so refusing, assumed to exercise and did exercise the power conferred by the provisions of section 3891, Revised Codes of [fol. 25] Montana, 1921; deny that section 3891, or any part thereof, is violative of the due process of law clause

of the Fourteenth Amendment to the Constitution of the United States, or of any other provision of said Constitution; deny that said section 3891 authorized the Commission arbitrarily or without notice or hearing, or any opportunity for hearing, to refuse to concur in rates less than the rates prescribed by or approved by said Commission as just and reasonable rates; admit that section 3892 of Revised Codes of Montana, 1921, make it unlawful for the plaintiff, or any other public utility, to charge or demand or collect or receive a greater or less compensation for any service performed than the rates prescribed by or approved by the Public Service Commission of Montana.

XV

With respect to paragraph XXVII of said bill of complaint, defendants deny that the powers granted to said Commission by section 3891, Revised Codes of Montana, 1921, are in violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States; and deny that said report and order deprives the plaintiff of its property or right or liberty to contract for the furnishing of gas to the public at Shelby, Montana.

XVI

With respect to paragraph XXVIII of said bill of complaint, defendants deny that the plaintiff is without plain, speedy, or adequate remedy in the ordinary course of the law.

XVII

Except as hereinabove specifically admitted, denied, or qualified, these answering defendants deny specifically each and every and all other allegations contained in said bill of complaint.

[fols. 26 & 27] Wherefore the defendants pray that the bill of complaint herein be dismissed and that they, and each of them, go hence without day.

L. A. Foot, Attorney General of the State of Montana; Francis A. Silver, Counsel Public Service Commission of Montana, Attorneys for Defendants, residing at Helena, Montana.

Service of the above and foregoing answer admitted and receipt of a copy thereof acknowledged this 29th day of June, 1931.

Gunn, Rasch, Hall & Gunn, Attorneys for Plaintiff.

[File endorsement omitted.]

[fols. 28 & 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Sept. 19, 1932

This cause came on regularly for final hearing this day, Mr. M. S. Gunn and Mr. E. G. Toomey appearing for the plaintiff, and Mr. Francis A. Silver appearing for defendants.

Thereupon Mr. Gunn presented to the court a proposed amendment to the complaint herein and moved that the same be allowed, to which proposed amendment Mr. Silver objected in behalf of the defendants. Thereupon the court stated that said proposed amendment would be considered by the court when making up its decision and that an exception would be allowed the parties to any adverse ruling made by the court.

Thereupon Mr. Silver moved the court to rule on the objections made by the defendants during the taking of testimony before the Examiner at Shelby, Montana, on September 12, 1932, whereupon the court stated that no ruling would be made at this time but that the said objections would be considered by the court in making up its decision, and that an exception would be allowed the parties to any adverse ruling of the court.

Thereupon, it was agreed by counsel that certain corrections be made in the transcript of testimony taken before the Examiner, whereupon the court directed that leave be granted counsel to make the corrections by interlineation, and initial them so the court may have a correct record.

Thereupon the cause was argued by counsel and submitted and by the court taken under advisement, the parties

being granted leave to submit copies of their brief before the Supreme Court of the United States.

Court thereupon suspended until such time as the further business of the court shall again require it to resume.

C. R. Garlow, Clerk, by H. H. Walker, Deputy.

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

Herein opinion this day rendered and filed; the clerk will note plaintiff's exception to amendment denied and defendants' to objections to evidence overruled.

[fol. 31] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

No. 1060

GREAT NORTHERN UTILITIES CO., Plaintiff,

vs.

PUBLIC SERVICE COMMISSION et al., Defendants

Before Sawtelle, Circuit Judge, and Pray and Bourquin, District Judges

OPINION—Filed Oct. 5, 1932

BOURQUIN, District Judge:

Heretofore, an interlocutory injunction was awarded plaintiff against the defendant commission's rate order found unreasonable for that (1) at rates affording fair return the field is insufficient for more than one utility, in consequence of which plaintiff's right to compete with a rival to the survival of the stronger if not the fitter, can not be legally divested by the minimum rate by the order prescribed, and/or (2) the prescribed rates do not afford fair return. See 52 Fed. (2) 802.

Affirmance by the Supreme Court is "without prejudice to the consideration and determination at final hearing of all questions of law and fact, including the question of the reasonableness, in the circumstances disclosed, of the order which is the subject of the suit." See 285 U. S. 524.

At this final hearing the evidence, objections to which are overruled, varies little if any from that at the former hearing, and discloses the facts, circumstances and situation are unchanged.

Likewise are our views and findings, which together with pleadings and evidence sufficiently appear at 52 Fed. (2) 802, and without more the injunction is made permanent.

It may be observed that plaintiff's proposed amendment to its complaint in substance that the commission's rates will not afford fair return and are confiscatory, opposed by defendants, is unnecessary and disallowed.

[fols. 32 & 33] The fact was recognized by defendants from the beginning, they declared it in their report of which the order is a part, and conceded it throughout save in so far as by belated and strategic answer, uselessly compelling this second final hearing, they deny the knowledge of insufficiency of the field which their report discloses they in fact had. If now an issue, the pleadings suffice to present it, necessarily involved in "the question of the reasonableness, in the circumstances disclosed, of the order" in suit. Decree accordingly.

[File endorsement omitted.]

[fol. 34] In United States District Court

[Title omitted]

Findings of Fact and Conclusions of Law—Filed Oct. 15, 1932

This cause came on to be further heard at this term upon the application of defendants at Helena, Montana on September 19, 1932, and the court having considered the pleadings and proof, including the evidence and exhibits received at the hearing in Shelby, Montana on September 12, 1932, before an Examiner for the Court, and the arguments

of counsel and the briefs submitted, and now being fully advised in the premises, makes the following

Findings of Fact

1. That the gas plant and system of Citizens Gas Company at Shelby, Montana is, substantially, a duplication of the gas plant and system of the plaintiff company.

2. That the community of Shelby, Montana is insufficient to support and maintain, at rates affording fair return, the competing gas plants and systems therein installed and operated.

3. That the rates prescribed by the Commission for the plaintiff company deprive it of the right of competition, which right plaintiff has in the circumstances disclosed and said rates, if applied to plaintiff's operations, would destroy its property.

4. That, in any event, the rates prescribed by the defendant Commission would, if applied to plaintiff's operations, fail to produce legitimate operating expenses, taxes, depre-
[fols. 35 & 36] ciation and a fair return upon the fair value of plaintiff's property.

And from the foregoing the court now makes the following:

Conclusions of Law

1. That Report and Order No. 1530 of the defendant Commission, promulgated January 22, 1929, and complained of in the complaint herein, is invalid.

2. That the interlocutory injunction heretofore granted herein should be made permanent.

Decree accordingly.

Bourquin, District Judge for the Court.

[File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

GREAT NORTHERN UTILITIES COMPANY, Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA, DANIEL BOYLE, Lee Dennis, and Leonard Young, Members of said Commission, and L. A. Foot, Attorney General of the State of Montana, Defendants

DECREE OF PERMANENT INJUNCTION—Filed Oct. 15, 1932

This cause came on to be further heard at this term before the specially constituted court—the Hon. William H. Sawtelle, Judge of the Circuit Court of Appeals for the Ninth Circuit, the Hon. Geo. M. Bourquin, and the Hon. Chas. N. Pray, District Judges in the District Court of the United States for the District of Montana—at Helena, Montana, on September 19, 1932, upon the application of defendants, and was argued by counsel; and thereupon, upon consideration thereof,

It was ordered, adjudged and decreed, and this does order, adjudge, and decree, that the order complained of herein is null and void and the interlocutory injunction heretofore issued herein is hereby made permanent and, accordingly, the defendants, and each of them, and all persons acting in aid or assistance of them, shall be, and they are hereby permanently enjoined and restrained from enforcing the said order complained of, a copy of which is made a part of the Bill of Complaint herein and from, in any manner, interferring with the plaintiff in charging and collecting rates for natural gas furnished through its gas plant or system in Shelby, Montana, less than the rates prescribed by said order.

It is further ordered, adjudged and decreed that plaintiff [fols. 38 & 39] have and recover its costs herein expended and incurred, amounting to the sum of — ($—).

Done and dated this 15th day of October, 1932.

Bourquin, District Judge, for the Court.

[File endorsement omitted.]

[fols. 40 & 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed Nov. 26, 1932

To the Honorable District Court of the United States, District of Montana, and to the Honorable Judges thereof:

The above-named Public Service Commission of Montana, Dan Boyle, Lee Dennis and Leonard Young, members of said Commission, and L. A. Foot, Attorney General of the State of Montana, defendants, and each and all of them, feeling aggrieved by the permanent injunction decree and order rendered and entered in the above-entitled cause on the 15th day of October, 1932, do, and each of them hereby does, appeal from said permanent injunction decree and order to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and they, and each of them, pray that this appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said permanent injunction decree and order was based, duly authenticated, be sent to the Supreme Court of the United States, Washington, D. C., under the rules of such court in such cases made and provided.

And your petitioners further pray that a proper order relating to the required security to be required of them be made.

L. A. Foot, Attorney General of the State of Montana; Francis A. Silver, Counsel Public Service Commission of Montana, Counsel for Defendants and Appellants, Residing at Helena, Montana.

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Nov. 26, 1932

Come now Public Service Commission of Montana, Dan Boyle, Lee Dennis and Leonard Young, members of said

Commission, and L. A. Foot, Attorney General of the State of Montana, defendants in the above-entitled cause, and file the following assignment of errors upon which they will rely upon the prosecution of the appeal herewith petitioned for in said cause, from the permanent injunction decree and order made and entered in the above-entitled court and cause on the 15th day of October, 1932:

I

The United States District Court for the District of Montana erred in failing to grant the motion interposed by the defendants to dismiss the bill of complaint filed in the above-entitled cause on the ground that the bill of complaint does not state facts sufficient to constitute a valid cause of action in equity, or at all.

II

The United States District Court for the District of Mon-
[fol. 43] tana erred in overruling the objections of the defendants herein to the introduction of any evidence on behalf of the complainant on the ground and for the reason that the bill of complaint herein does not state facts sufficient to constitute a cause of action in equity, or at all.

III

The United States District Court for the District of Montana erred in adjudging and decreeing that the order complained or by plaintiff is null and void.

IV

The United States District Court for the District of Montana erred in adjudging and decreeing that the order complained of by plaintiff is null and void because the record herein discloses that the specific, just, and reasonable schedule of rates prescribed by the defendant commission was made, issued, and promulgated to prevent ruinous competition in the premises, under the authority delegated to the defendant commission in Chapter 52, Laws of Montana, 1913 (Chap. 260, Part. III, Political Code, Revised Codes of Montana, 1921), as interpreted by the highest appellate

court of the State of Montana, to-wit: The Supreme Court of the State of Montana.

The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein permanently enjoining and restraining the defendants, and each of them, from enforcing the order complained of herein.

VI

The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein [fol. 44] permanently enjoining and restraining the defendants, and each of them, from enforcing the order complained of herein, in that the records do conclusively show that the specific, just, and reasonable schedule of rates prescribed in said order is neither confiscatory nor discriminatory, but is higher than the schedule of rates being then and there charged by plaintiff, which latter schedule the plaintiff admitted to be insufficient to produce a reasonable return on the present value of its property used and useful in the public service and which schedule of rates plaintiff admitted compelled it to operate at a loss.

VII

The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein, in that the evidence conclusively shows that the specific, just, and reasonable schedule of rates prescribed by the defendant commission was prescribed in the public interest and for the purpose of preventing the plaintiff and the other utility operating in the same field with plaintiff from destroying each other by ruinous competition.

VIII

The United States District Court for the District of Montana erred in holding that the plaintiff, Great Northern Utilities Company, a public utility, had and possessed, or has or possesses the right to engage in unrestricted competition with Citizens Gas Company, a public utility, engaged in serving the same general field as plaintiff, in the matter of rates or charges to be fixed or charged for the sale and distribution of natural gas to the public in Shelby, Montana.

IX

The United States District Court for the District of Mon-
[fol. 45] tana erred in holding that the plaintiff, Great Northern Utilities Company, a public utility, had and possessed, or has and possesses the right to engage in a rate-war at or in Shelby, Montana, with its competitor, Citizens Gas Company, a public utility.

X

The United States District Court for the District of Montana erred in failing and refusing to give due or any consideration to the right of the consumers of natural gas at Shelby, Montana, to have reasonably adequate, continuous, and uninterrupted natural gas service for domestic, commercial, and industrial uses in Shelby, Montana, from the public utilities therein engaged in selling and distributing natural gas.

XI

The United States District Court for the District of Montana erred in holding that the plaintiff Great Northern Utilities Company, a public utility, had or has the right to disable itself by means of engaging in a rate war with Citizens Gas Company, a public utility, from performing its duty to the public to provide reasonably adequate service and facilities to those members of the public attached to its natural gas system and receiving natural gas service therefrom.

XII

The United States District Court for the District of Montana erred in holding that the plaintiff Great Northern Utilities Company, a public utility, had or has the right to disable Citizens Gas Company, a public utility, by means of engaging it in a rate war, from performing its duty to the public to provide reasonably adequate service and facilities to those members of the public attached to its natural gas system and receiving natural gas service therefrom.

[fol. 46]

XIII

The United States District Court for the District of Montana erred in holding and finding that the evidence is suffi-

cient to prove the allegation of plaintiff's bill of complaint that the population of the city of Shelby, Montana, and the demands for natural gas therein are insufficient to support the public utility natural gas plants and systems of the plaintiff and the Citizens Gas Company, a Corporation, at Shelby, Montana.

XIV

The United States District Court for the District of Montana erred in holding and finding that the evidence presented established that the field served by plaintiff and the Citizens Gas Company, a corporation, as public uitilities in the sale and distribution of natural gas, to-wit: Shelby, Montana, is insufficient to support and maintain more than one of the said public utilities.

XV

The United States District Court for the District of Montana erred in holding and findings that the specific rates prescribed by the defendant commission for application in Shelby, Montana, will not afford a fair return to plaintiff upon the present fair valuation of its property used and useful in the public service.

XVI

The United States District Court for the District of Montana erred in holding and finding that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford fair returns to plaintiff and the Citizens Gas Company, a corporation, public utilties engaged in the sale and distribution of natural gas to the public at said Shelby, Montana.

[fol. 47] XVII

The United States District Court for the District of Montana erred in holding and finding that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford a fair return to more than one of the public uitilities, to-wit: plaintiff and Citizens Gas Company, a corporation, engaged in the sale and distribution of natural gas in said Shelby, Montana.

XVIII

The evidence presented is insufficient to support the finding that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford fair returns to plaintiff and Citizens Gas Company, a corporation, public utilities engaged in the sale and distribution of natural gas to the public at said Shelby, Montana.

XIX

The evidence presented is insufficient to support the finding of the United States District Court for the District of Montana that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford a fair return to more than one of the public utilities, to-wit: plaintiff and Citizens Gas Company, a corporation, engaged in the sale and distribution of natural gas in said Shelby, Montana.

XX

The evidence presented is insufficient to warrant the or any finding by the United States District Court for the District of Montana as to the reasonableness of the natural gas rates prescribed by the Public Service Commission of Montana for observance by plaintiff in its sale and distribution of natural gas to the public at Shelby, Montana.

[fol. 48]

XXI

The United States District Court for the District of Montana erred in holding that the pleadings presented an issue as to whether the rates prescribed by the defendant commission would yield a fair return to the plaintiff upon the present fair value of its property used and useful in the public service.

XXII

The United States District Court for the District of Montana erred in holding that the pleadings are sufficient to present the question of the reasonableness and justness of the rates prescribed by the defendant commission.

XXIII

The United States District Court for the District of Montana erred in failing to find the facts specially and to

state separately its conclusions of law thereon as is required by Rule 70½ of the Equity Rules promulgated by the United States Supreme Court June 2, 1930, to take effect October 1st, 1930.

XXIV

The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein in that the pleadings and evidence conclusively show that the plaintiff is engaged in operating a public utility in the city of Shelby, State of Montana, for the distribution of natural gas under and by virtue of a special franchise granted by the city of Shelby, Montana, a municipal corporation, pursuant to the provisions of Sections 5074 to 5077, both inclusive, of the Revised Codes of Montana, 1921, and that the plaintiff company accepted said special franchise as assignee of the original grantee, subject to [fol. 49] the provisions of Chapter 52, Laws of Montana, 1913 (Chapter 260, Part III, Political Code, Revised Codes of Montana, 1921).

XXV

The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein in that the pleadings and evidence conclusively show that the plaintiff is engaged in operating a public utility in the city of Shelby, State of Montana, for the distribution of natural gas under and by virtue of a special franchise granted by the city of Shelby, Montana, a municipal corporation, pursuant to the provisions of Sections 5074 to 5077, both inclusive, of the Revised Codes of Montana, 1921, and that the plaintiff company accepted said special franchise as assignee of the original grantee, subject to the express proviso contained in said franchise, as follows, to-wit: "Section 3. The rates to be charged for gas of whatsoever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of Montana shall order and determine," thereby waiving any right it might otherwise have to engage in a rate war with a competitor or to charge any rates or rate lower than a specific just and reasonable rate or rates prescribed by the Board of Railroad Commissioners of the State of

Montana in its ex officio capacity as Public Service Commission of Montana.

XXVI

The United States District Court for the District of Montana erred in rendering a decree for plaintiff herein on the theory that the specific rate order of the defendant commission is confiscatory in that the Fourteenth Amendment to the Constitution of the United States does not guarantee to plaintiff a reasonable return on the present fair value of its property used and useful in the public service, but guarantees it merely an equal opportunity to secure such reasonable return, which equal opportunity was preserved to plaintiff in the premises by the minimum [fol. 50] or specific rate order promulgated by the defendant commission.

XXVII

The United States District Court for the District of Montana erred in rendering a decree for plaintiff herein on the theory that the State must abdicate its regulating power when the field will not support two utilities because plaintiff entered the public utility field as a distributor and seller of natural gas at Shelby, Montana, without any exclusive right to so occupy said field and without any guarantee against competition.

XXVIII

The United States District Court for the District of Montana erred in engrafting an amendment upon Chapter 52, Laws of 1913 (Chapter 260, Part III, Political Code, Revised Codes of Montana, 1921), in conflict with the meaning and interpretation of said chapter as construed by the highest appellate court of the State of Montana, to-wit: the Supreme Court of the State of Montana.

XXIX

The United States District Court for the District of Montana erred in passing upon the issues involved herein in refusing to accept the construction placed upon Chapter 52, Laws of 1913 (Chapter 260, Part III, Political Code,

Revised Codes of Montana, 1921), by the highest appellate court of the State of Montana, to-wit: the Supreme Court of the State of Montana.

XXX

The United States District Court for the District of Montana erred in overruling defendants' objections to the testimony of plaintiff's witness E. R. Foster, stating the [fol. 51] conclusions drawn by said witness from plaintiff's exhibit No. 5, in substance to the effect that said exhibit No. 5 indicates that if the rate prescribed by the defendant commission had actually been charged during the periods covered by said exhibit No. 5, to-wit: January 1st, 1929, to July 31, 1932, both inclusive, the plaintiff would not have earned enough to pay operating expenses, including depreciation, and have left a net amount which would produce a fair return based upon the valuation found by said defendant commission.

XXXI

The United States District Court for the District of Montana erred in overruling the defendants' objections to the testimony of plaintiff's witness E. R. Foster, that the total revenue of plaintiff company for the calendar year 1929, applying the rates prescribed by the defendant commission would be $19,753.34.

XXXII

The United States District Court for the District of Montana erred in overruling defendants' objections to testimony of plaintiff's witness E. R. Foster, in substance to the effect that the plaintiff company would, for the calendar year 1929, fall $11,669.64 short of meeting the requirements fixed by the defendant commission after allowances for depreciation and return, if the total revenues of the plaintiff company were computed upon the basis of applying the rates prescribed by the defendant commission to the quantity of natural gas sold by the plaintiff company during the year 1929.

XXXIII

The United States District Court for the District of Montana erred in admitting in evidence on behalf of plain-

tiff over the objection and exception of defendants a document consisting of two pages, headed respectively: "Sheet 1, Great Northern Utilities Company, Gas Department [fol. 52] Only, Study of Allowance for Depreciation and Return, Based on Montana Commission Order #1530," and "Sheet 2, Great Northern Utilities Company, Gas Department Only, Study Showing Deficit for Three Years and Seven Months Based on Rate Found and Allowances for Depreciation and Return in Commission Order #1530, Together with Actual Operating Expenses from Company Records" (Plaintiff's Exhibit No. 5), and which reads as follows:

Sheet 1

		1929	1930	1931	1932 to July 31st
Value of property as of 1-1-28, p. 15, Commission order #1530	$43,214.22				
Net Additions during year 1928 from company records	3,964.88				
Total at first of year		$47,179.10	$47,573.44	$48,618.55	$48,790.73
Net additions during year		394.34	845.11	172.18	†534.60
Depreciation on Value at 1st of year as allowed in Commission Order #1530. (8% on all except Land at $1,300 plus Working Capital at $2,500)		$3,470.33	$3,501.88	$3,585.16	*$2,093.74
4% on net additions during year		15.77	33.80	6.89	†1.25
Total for depreciation		3,486.10	3,535.68	3,592.05	2,092.49
Return on Value at 1st of year as allowed in Commission Order #1530 (8%)		$3,774.33	$3,085.88	$3,889.48	*$2,276.90
4% on net additions during year		15.77	33.80	6.89	†1.25
Total for return		3,790.10	3,839.68	3,896.37	2,275.65
Total Sales, M. Cu. Ft		73,160.5	67,375.0	55,889.0	39,559.5
Depreciation per M. Cu. Ft.		$.0477	$.0525	$.0643	$.0529
Return " " " "		.0518	.0570	.0697	.0575

* Based on 7 months.

† Red in copy.

[fol. 53]

Sheet 2

	1929		1930		1931		1932 to July 31	
	Total	Per M.c.f.	Total	Per M.c.f.	Total	Per M.c.f.	Total	Per M.c.f.
M. cu. ft. sold	73,160.5		67,375.0		55,889.0		39,559.5	
Expenses:								
Transmission and Distribution	$2,339.76	$.0320	$2,342.97	$.0348	$1,843.97	$.0330	$714.05	$.0181
Commercial	3,229.60	.0442	2,679.47	.0398	1,846.97	.0331	912.71	.0231
General	8,987.64	.1228	8,287.37	.1230	8,071.19	.1444	5,385.04	.1361
Undistributed	1,166.42	.0159	1,247.85	.0185	1,307.75	.0234	1,456.71	.0368
Taxes	1,702.54	.0233	1,007.14	.0149	1,002.18	.0179	606.25	.0153
Total	17,425.96	.2382	15,564.80	.2310	14,072.06	.2518	9,074.76	.2294
Cost of gas	6,750.82	.0923	5,388.99	.0800	5,399.28	.0966	3,816.80	.0965
Total expenses	24,176.78	.3305	20,953.79	.3110	19,471.34	.3484	12,891.56	.3259
Depreciation based on allowance by Montana Commission in Order # 1530	3,486.10	.0476	3,535.68	.0525	3,592.05	.0643	2,092.49	.0529
Fair return based on Montana Commission Order # 1530	3,790.10	.0518	3,839.68	.0570	3,896.37	.0697	2,275.65	.0575
Total Required Revenue	31,452.98	.4299	28,329.15	.4205	26,959.76	.4824	17,259.70	.4363
Estimate Revenue based on rate p. 26 of Commission Order # 1530 (Av. Price $27 per M. c. f.)	19,753.34	.2700	18,191.25	.2700	15,090.03	.2700	10,681.07	.2700
Deficit	11,699.64	.1599	10,137.90	.1505	11,869.73	.2124	6,578.63	.1663

XXXIV

The United States District Court for the District of Montana erred in admitting in behalf of plaintiff over the objection and exception of defendants a document headed, "Great Northern Utilities Company, Gas Department Only, Study Showing Application of Montana Commission Report and Order #1530 to Actual Sales of Gas for Past Three Years" (Plaintiff's Exhibit 6), and which reads as follows:

[fol. 54]

	Per M. cu. ft.			
	1929	1930	1931	1932 to July 31
Operating expenses exclusive of cost of gas purchased and depreciation allowance (p. 25 of Order #1530)	$.1354	$.1354	$.1354	$.1354
Actual cost of gas from company records.	.0923	.0800	.0966	.0965
Depreciation allowance at 8%, based on Commission Order (p. 25 of Order #1530)	.0476	.0525	.0643	.0529
Rate of return at 8% based on Commission Order (p. 26 of Order #1530)	.0518	.0570	.0697	.0575
Total requirement	.3271	.3249	.3660	.3423
Average revenue which will result from application of rate schedule ordered by Commission (p. 26 of Order #1530)	.2700	.2700	.2700	.2700
Deficit	.0571	.0549	.0960	.0723

XXXV

The United States District Court for the District of Montana erred in overruling defendants' objection to the testimony of plaintiff's witness E. R. Foster, purporting to explain or analyze the data contained in plaintiff's exhibits Nos. 5 and 6, the substance of said witness' testimony being as follows:

That the actual operating expenses of the company per M. cubic feet are materially higher than the estimated expenses made by the commission in the order complained of, to-wit: $.1354 per M. cubic feet for the natural gas sold. In Exhibit No. 6, operating expenses have been set up at the figures specified by the commission and to those figures have been added the actual cost of gas per M. cubic feet sold, shown in the company's record. The depreciation allowances and the allowances for return shown on Exhibit No. 6 have been transferred from Exhibit No. 5 and for [fol. 55] the periods shown are based upon the commis-

sion's figures as indicated in the order complained of for the years 1929 to 1931, inclusive, and the first seven months period of 1932. In comparing the total requirements for all expenses with the average revenue which the Commission said would result from their rate schedule as ordered, we find deficits as follows: 1929, $.0571 per M. cubic feet; 1930, $.0549 per M. cubic feet; 1931, $.0960 per M. cubic feet; and for the seven months ending July 31, 1932, $.0723 per M. cubic feet of gas sold. The application of the commission rate to actual gas sales for the same periods shows that those rates are about 7¼ cents per M. cubic feet under that which would be necessary to wipe out the deficit. This study was prepared to show what might result if all the estimates made by the commission were applied with the exception of the cost of gas, a point which is an actual fact. There may be some question about operating expenses at any time and consequently the estimated expenses as indicated in the commission's order were set up. The only thing in the study that is different from those estimates in the commission's order is the cost of gas, that is, the amount actually paid per M. cubic feet during these periods.

In compiling Exhibits Nos. 5 and 6, witness followed in general the same methods that the commission followed in its report in building a rate.

The revenues shown on sheet 2 of Exhibit No. 5, resulting from the application of the commission rate may be compared against witness' total expense figures exclusive of cost of gas for the same year and show just a slight coverage of the expenses because of taxes, with nothing for cost of gas, nothing for depreciation, and nothing for a fair return.

XXXVI

The United States District Court for the District of Montana erred in overruling defendants' objections to plaintiff's witness E. R. Foster's testimony, in substance, to the effect that as a result of the experience since com- [fol. 56] petition commenced and based upon his own personal knowledge, there would not be a wide divergence from the average found by the commission in its customers' analysis in comparison with a customers' analysis at the present time.

XXXVII

The United States District Court for the District of Montana erred in overruling defendants' objection to the testimony of plaintiff's witness E. R. Foster, stating in substances that the spread between expense figures found by the commission of $.1354 per M. cubic feet exclusive of cost of gas, and the witness' figures based on actual operations is about ten cents per M. cubic feet.

XXXVIII

The United States District Court for the District of Montana erred in overruling defendants' objection to the testimony of plaintiff's witness E. R. Foster, stating in substance to the effect that the spread between the commission's findings as to expense per M. cubic feet and the actual result of the company's experience is so great that in the witness' judgment it would not be affected at all by any change in the 27-cent figure and that the revenue requirements during the four periods indicated on page 2 of Exhibit No. 5 checks from 42.05 cents per M. cubic feet sold to 48.24 cents per M. cubic feet sold, and the requirement of each of the periods was much greater than the top step of the rate set by the commission, to-wit: 35 cents per M. cubic feet, and on the basis of average revenue requirement shown on the witness' exhibit No. 5, it would be necessary for the plaintiff to get an average of approximately 45 cents per M. cubic feet as against the commission's allowance of 27 cents average.

XXXIX

The United States District Court for the District of [fols. 57-62] Montana erred in overruling defendants' motion made at the conclusion of the plaintiff's case to strike from the record all of the testimony of plaintiff's witness E. R. Foster relative to the application of the commission's prescribed rate in its report and order No. 1530, and the estimated earnings thereof, and all evidence concerning Exhibits Nos. 5 and 6, and each of said exhibits, for the reasons that the same do not tend to support any issues tendered by the complaint herein, are wholly irrelevant, and on the further ground that the question of the confi-catory character of the rates prescribed by the commission are nowhere put in issue by the complaint herein.

Wherefore defendants pray that the said permanent injunction decree and order be reversed and set aside, and for such other and further relief as to the court may seem just and proper.

Dated at Helena, Montana, this 26th day of November, 1932.

L. A. Foot, Attorney General of the State of Montana; Francis A. Silver, Counsel Public Service Commission of Montana, Attorneys for Defendants and Appellants, Residing at Helena, Montana.

[File endorsement omitted.]

[fols. 63 & 64] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed Nov. 26, 1932

On motion of Francis A. Silver, Esq., counsel for defendants and appellants, it is hereby ordered that an appeal to the Supreme Court of the United States from the permanent injunction decree and order heretofore filed and entered herein on October 15, 1932, be, and the same is hereby allowed, and that a transcript of the record, testimony, exhibits, stipulations, and all proceedings duly authenticated be forthwith transmitted to said Supreme Court of the United States, in accordance with the rules of such court in such cases made and provided.

It is further ordered that the bond on appeal be fixed at the sum of One Thousand ($1,000.00) Dollars.

Dated at Helena, Montana, this 26th day of November, 1932.

Charles N. Pray, Judge.

[File endorsement omitted.]

[fols. 65-71] Citation, in usual form, showing service on E. G. Toomey et al., filed November 28, 1932, omitted in printing.

[fol. 72] IN UNITED STATES DISTRICT COURT

No. 1060

GREAT NORTHERN UTILITIES COMPANY, Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF MONTANA, DAN BOYLE, LEE DENNIS, and Leonard Young, Members of said Commission, and L. A. Foot, Attorney General of the State of Montana, Defendants

Statement of Evidence—Filed Dec. 15, 1932

CAPTION

Be it remembered that the above-entitled cause came on regularly for final hearing upon the merits before the above court sitting in equity, Hon. William H. Sawtelle, Circuit Judge, Hon. Geo. M. Bourquin, and Hon. Chas. N. Pray, District Judges, presiding, on the 19th day of September, 1932, upon the issues formed by the Bill of Complaint and the Answer thereto, Gunn, Rasch, Hall and Gunn, and E. G. Toomey, appearing as counsel for plaintiff, and L. A. Foot, Attorney General of the State of Montana, and Francis A. Silver, Counsel for Public Service Commission of Montana, appearing as counsel for defendants.

That pursuant to an order of the above-entitled court, made and entered September 1st, 1932, the evidence in the above-entitled cause upon final hearing was taken before E. K. Cheadle, Jr., an Examiner appointed by the above-entitled court to take testimony in the above-entitled cause for final hearing, on September 12, 1932, at Shelby, Montana, which evidence received and taken before said Examiner was the only evidence taken in the above-entitled court and cause upon final hearing as aforesaid, and that the said evidence on final hearing, together with all objec-
[fol. 73] tions thereto, was duly reported to the above-entitled court by said Examiner on the said 19th day of September, 1932, and was as follows:

Plaintiff's Case

Plaintiff offered in evidence a true, full and correct copy of Report and Order No. 1530, issued by Public Service

Commission of Montana on January 22, 1929, in its Dockets Nos. 991 and 1028, in the matter of Public Service Commission of Montana v. Great Northern Utilities Company, respondent, whereupon the defendants interposed the following objection, to-wit:

"Mr. Silver: For the record let it be shown that at this time the defendants, and each of them, object to the introduction of any evidence on behalf of the complainant herein on the grounds and for the reasons that the said complaint does not state facts sufficient to constitute a cause of action in equity, or at all."

Whereupon, and after the said objection of defendants had been duly noted in the record by the Examiner, said above-mentioned report and order No. 1530 was received in evidence, subject to said objection, which said report and order is in words and figures (omitting formal caption) as follows:

[fol. 74] OFFER IN EVIDENCE

By the COMMISSIONER:

On September 21, 1927, the Commission, upon its own motion, instituted an inquiry into the reasonableness of the rates charged by the Great Northern Utilities Company (hereinafter called utility), for natural gas service at Shelby, Toole County, Montana. The schedule of rates then in effect commenced with a base rate of 60 cents (net) and through a series of five steps reached the lowest rate charged, to-wit: 30 cents (net) for all consumption over 300,000 cubic feet per month. Prior to the return day upon the order to show cause why the rates should not be reduced, the utility filed a new tariff with the Commission stating rates as follows:

			Net
First	10,000 cu. ft. per month per meter		50c per M. Cu. ft.
Next	10,000 " " " " " "		45c " " " "
Next	30,000 " " " " " "		40c " " " "
Next	250,000 " " " " " "		35c " " " "
Over	300,000 " " " " " "		30c " " " "

Minimum Bill: $1.50 per month per meter.
Prompt payment discount: None.

The tariff was approved tentatively by the Commission to await its findings in the instant inquiry. The only re-

duction between the net rates of the prior schedule and the one tentatively approved is found in the first 10,000 cubic feet consumption. On November 15, 1927, the utility filed a written return to the order to show cause setting forth a resume of its operating revenues and expenses and alleging, "that the actual investment in the gas utility up to October 1st, 1927, exceeds one hundred thousand ($100,000.00) dollars. That the cost of reproduction new of the property devoted to the gas service is in excess of one hundred twenty-five thousand ($125,000.) dollars and that the fair present value of the gas property devoted to public service at Shelby demands and requires in order to earn a fair return in accordance with the decisions of the Supreme Court of the United States, increased rates for gas service." The cause was regularly assigned for public hearing and came on to be heard at Shelby, on November 29, 1927, at which time the utility submitted evidence concerning its properties and gas operations at Shelby. The figures submitted by the utility were challenged in many important respects by citizens appearing upon behalf of consumers at Shelby. So [fol. 75] great was the disparity in the figures submitted by the utility and those offered upon behalf of the citizens' committee that the Commission deemed it necessary that a valuation be made by its engineering staff, which was accordingly done. For the purpose of receiving the report of its Chief Engineer in evidence in the record, a second public hearing was held at Shelby on October 1, 1928, copies of our engineer's valuation having been furnished to the utility and the citizens' committee in advance.

On January 10, 1927, prior to the institution of this investigation, the City of Shelby granted a franchise to the Shelby Oil and Gas Company, a local company, organized by citizens of Shelby, authorizing the use of the city's streets and alleys for the laying of gas mains, it being the announced intention of the Shelby Oil and Gas Company to construct a natural gas plant in competition with the utility. This franchise ultimately passed, by assignment, to the Citizens Gas Company, a Montana corporation (controlled by Minneapolis, Minnesota, interests), which during the fall of 1928, undertook and completed a pipe line leading to Shelby from natural gas wells situated about three miles from Shelby and a distribution system covering the

business section of Shelby, and a portion of its residential area. The Citizens Gas Company commenced distribution of natural gas at Shelby during the latter part of October and is operating under a tariff, approved by the Commission, stating rates as follows:

						Net
First	10,000	cubic feet	per	month	35c	per M. cu. ft.
Next	10,000	"	"	"	30c	" " "
Next	30,000	"	"	"	27½c	" " "
Next	250,000	"	"	"	25c	" " "
All over	300,000	"	"	"	22½c	" " "

Following the commencement of operations by the Citizens Gas Company, the Great Northern Utilities Company filed with the Commission on November 8, 1928, a new tariff providing rates of 25 cents per thousand cubic feet for all consumption up to 300,000 cubic feet per month, and 20 cents per thousand cubic feet for all quantities above 300,000 cubic feet. On November 19, 1928, and before the Commission had taken any action on its tariff of November 8th, the utility filed another tariff embodying further proposed reductions in its rates, the new schedule calling for 20 [fol. 76] cents per thousand cubic feet up to 300,000 cubic feet and 15 cents for all over. These filings were promptly met with a complaint and protest by the Citizens Gas Company on the grounds that the rates were "unfair, unjust and unreasonable" to the Citizens Gas Company; "will not yield nor return a reasonable profit on its investments and represents unjust and unfair competition." This complaint was assigned a separate docket number (1027) and is now pending upon a motion to dismiss for lack of jurisdiction filed by the Great Northern Utilities Company. On November 30, 1928, the Commission, on its own initial motion, ordered this utility to appear before it at Shelby on December 20, 1928, to submit evidence in support of the reasonableness and justness of the rates and charges proposed in its tariff of November 19, 1928, which is designated hereafter as Schedule 4-A. The tariff of November 8th, 1928, was cancelled by the filing of Schedule 4-A, sheet 2. In accordance with the Commission's order, the utility appeared on the date set and through its manager and superintendent produced evidence hereinafter discussed. The Citizens Gas Company also appeared at the hearing as did some twelve

consumers, who allege in their appearance filing that the tariff now proposed by the utility is not proposed in good faith; that the rates therein stated are not remunerative and that they are proposed only for the purpose of driving the Citizens Gas Company out of business.

The issues involved in these two proceedings commenced by the Commission Dockets 991 and 1028—are so interrelated that we have determined to consolidate them for decision. We proceed first to a determination of the fair value of the utility's property, used and useful, for the convenience of the public.

The utility submits the claim that the total value of its property and business, used and useful, devoted to natural gas service at Shelby, as of August 31, 1928, is 213,208.91. The segregated items composing its claimed rate base are set forth by the utility's engineer in his exhibit 8, Docket No. 991, hearing of October 1, 1928. They are as follows:

[fol. 77] Minimum Value of contract	$75,000.00
Original Purchase:	
(a) Land and Building (Gas Dept.)	3,000.00
(b) Clearing Way for Gas Utility	2,000.00
Improvements on Land and Building (60% to Gas Dept.)	2,621.11
Plan and Construction Engineering	15,000.00
" " " " Superintendence	10,000.00
Legal Expense (No Statutory Fees included)	1,500.00
Investment in Physical Property except as above at end of period based on Commission Finding at Sept. 30, 1923, ($31,403.10) plus Construction Expenditures from the company records	58,759.02
Fair allowance for working capital	13,500.00
Cost of Financing	8,028.78
Fair allowance for going value	23,800.00
Total Property and Business	$213,208.91

Buck, Chief Engineer for the Commission, made a valuation of the physical property of the utility upon the basis of reproduction cost new less depreciation at prices prevailing as of January 1, 1928. He arrives at the figure $43,440.86 as the cost of reproducing the utility's plant new and computes depreciation, based upon inspection, at $7,173.80, thus placing its present value (as of January 1, 1928) for rate-making purposes at $36,267.06. Intangibles are not included and land is valued at market value. The following table summarizes his findings:

Item	Reproduction cost	Per cent condition	Present value
Land	$1,300.00	....	$1,300.00
Buildings:			
(a) Office and warehouse	2,481.71	90	2,233.54
(b) Regulator House	1,186.11	95	1,126.81
Distribution:			
(a) Mains	16,914.36	80	13,531.49
(b) Services	4,761.55	65	3,095.01
Meters and Regulators	14,559.15	90	13,103.24
Shop tools	395.24	50	197.62
Office Equipment	600.61	95	570.58
Miscellaneous:			
(a) Car	285.00	70	199.50
(b) Telephone	957.13	95	909.27
Total	$43,440.86		$36,267.06
Equated per cent condition			83.48%

All of the above costs, excepting land, include an allowance of 14 per cent to cover construction overheads, as follows: Engineering and superintendence, 4 per cent; In- [fol. 78] terest during construction, 4 per cent; Insurance one per cent; Omission and contingencies, 2 per cent; and Organization, 3 per cent.

The market value of the land upon which the utility's office is situated and which is used jointly by the gas and electric departments, is apportioned by Buck on the basis of 55 per cent to the gas department and 45 per cent to the electric. The reproduction cost new of the office building itself is apportioned on the basis of 54.5 per cent to the gas department and 45.5 per cent to the electric, while the warehouse is allocated on a basis of 75 per cent to the gas department and 25 per cent to the electric. The ratio of apportionment of land and office fixtures is based upon the relationship in point of numbers between the gas and electric customers. Office building and warehouse allocation is based upon an estimate of the relative quantities of space used by the respective departments. The private telephone line is assumed to be used equally by both departments and is charged to the departments on that basis.

For the sake of convenience we will consider the items of value claimed by the utility, in the order in which they were set forth in Foster's exhibit, supra:

Minimum Value of Contract

The utility secures its supply of natural gas for distribution at Shelby from the Ohio Oil Company, under terms which call for its delivery to the utility at the city gates.

At the first hearing the utility produced a copy of its contract with the wholesale company bearing date of April 20, 1927, and which, by its terms, covered a period of five years beginning with November 14, 1927. Briefly stated, the contract provides for the purchase of natural gas at the city limits on a base pressure of four ounces above average atmospheric pressure and at a standard temperature of 60 degrees Fahrenheit at the rate of fifteen cents per one thousand cubic feet for the first five million cubic feet of gas taken in any month and at the rate of ten cents per M. cubic feet for all additional gas taken in any month. At the hearing in Docket No. 1028, the manager of the utility testified that he had been advised by the Chicago office of [fol. 79] the utility (the utility is owned by the North Continent Utilities Corporation, which is in turn controlled by the William A. Baehr Organization of Chicago), that commencing with November 1, 1928, the utility was to be furnished its supply of natural gas by the Ohio Oil Company at the flat rate of seven cents per thousand cubic feet. No writing of any kind was introduced nor any oral testimony given tending to show to what extent the contract of April 20th, 1927, was modified. We do not know from the record whether the Ohio Oil Company has merely temporarily waived its rights to the contract rates in order to permit the utility to engage in a rate war or whether the contract has been reformed so as to carry the seven-cent rate for its five-year term. Inasmuch as the cost of gas represents a substantial portion of the utility's operating expenses, an important factor in determining reasonable rates for future application at Shelby, the record is deficient. However, the utility makes no greater claim for its contract value under its alleged new rate, so that so far as the immediate subject at hand is concerned, the deficiency is not material.

The utility claims the sum of $75,000.00 as the minimum value of its contract with the Ohio Oil Company and requests that we pass that amount into the rate base upon which it is entitled to earn a fair return. From the record it appears that the company has never carried the contract on its records as an asset and that all sums of money paid to the Ohio Oil Company for natural gas purchased thereunder have been charged to operating expenses. That the contract with the Ohio Oil Company is a species of

property admits of no doubt but whether, in view of the utility's treatment of cost of gas purchased thereunder as an operating expense, it is also entitled to capitalize it in the rate base, is the question. It is true that if the utility did not have the Ohio Oil contract or a contract with some other person or corporation, it would be under the necessity of developing its own gas supply with an added capital investment upon which it would be entitled to earn a fair return, but, whether such a course would be economically sound in view of the extensive development by private interests of the gas fields lying adjacent to Shelby, rendering enormous quantities of natural gas available to purchasers at reasonable cost, is open to serious question. As we con- [fol. 80] ceive the duties of a public utility, it is incumbent upon it to produce its service as economically as practicable and that it is not free to adopt a less economical method of producing its service and charge to its patrons on the basis of such excessive cost. And, having entered into a contract which reduces the cost of obtaining its product below the cost of producing it with a plant constructed by itself, it has not the right to capitalize the difference or any part of it. If it should be made to appear that by reason of its advantageous contract, a portion of the utility's property, theretofore devoted to the public service, is rendered obsolete or unnecessary, equity requires that it be permitted to amortize the value of such superseded property, less salvage, over a term of years out of earnings (Re: Natural Gas Rates at Great Falls, 21 M. U. R. —, P. U. R. 1928 E 803. Our attention has been invited to a number of cases alleged to be in support of the utility's contention, including an expression of this Commission in re: Flathead Valley Electric Company, 19 M. U. R., —, P. U. R. 1926-C, 822. In that case it appeared that the Mission Range Power Company was engaged in furnishing electrical current, under wholesale rates, to the Flathead Valley Electric Company, a public utility engaged in serving the towns of Ronan and Pablo. The cost of the current purchased from the Mission Range Company was charged to operating expenses. In speaking of the amount of return being earned by the utility—there being no contention made that the contract for current should be valued and capitalized in the rate base—we said:

"Of course, this figure does not take into account the value of the Flathead Valley Company's contract with the Mission Range Power Company. That is a property item and, as such, devoted to the Ronan and Pablo services. It might be capitalized and added into the aggregate which goes to make up the rate base, or the contract may be given effect by charging in its annual cost among the operating expenses. This seems to be the method generally followed by Commissions in dealing with plants of this character and so we shall not attempt any capitalization of the contract * * *"

It will be noted that we said that the contract might be capitalized or given effect by charging its annual cost to operating expenses. In this case, the utility asserts the right to do both, a position manifestly inconsistent with our language in the alternative.

Other cases cited by the utility as sustaining its right to [fol. 81] capitalize the Ohio Oil contract are: Bonbright vs. Geary, 210 Fed. 44, Duluth Street Railway Company vs. Railroad and Warehouse Commission 4-F. (2d) 543, Pacific Gas and Elec. Co. vs. San Francisco, 265 U. S. 463, 44, Supt. Ct. R. 537, 68 Law Ed. 1075, Valparaiso vs. Public Service Commission, 190 Ind. 253, 129 N. W. 13; St. Louis Railway vs. Hagerman, 256 U. S. 314, 41 Supt. Ct. R. 488, 65 Law ed. 946; Re Crystal City Gas Co. (N. Y.) P. U. R. 1925-E, 91; Re Duluth Railway Co. (Minn.) P. U. R. 1927-A 52, and Re Kootenai Power Co. (Ida.) P. U. R. 1923-A 764. A careful reading of these cases discloses, in our opinion, situations unlike the instant one, rendering them unapplicable as precedents herein. In Bonbright vs. Geary, the power contract which the Arizona Commission failed to value was the direct cause of its generating plant, theretofore used in the public service, being abandoned. The old plant, having been abandoned, was not property used or useful in the public service and was therefore eliminated from the rate base. The Federal court's conclusion that the "Corporation Commission should have given this contract a reasonable valuation in view of all of the circumstances of the case", is sustainable under the rule applied by this Commission in Re Natural Gas Rates for Great Falls, supra, to the effect that where patents or contracts for cheaper power or new processes

are introduced in a utility's plant with the effect of quickly rendering absolete and valueless expensive equipment, not exhausted in the service, and of reducing operating expenses, it is not fair or equitable to claim all the benefits of the improved methods for the consumers and leave the utility to carry the burden of its superseded property on its own shoulders. (See Valuation of Public Service Corporations by Whitten (revised by Wilcox), Sec. 719, 1928 Ed.) In the Duluth Street Railway case, it appeared that prior to 1907 the company had generated its own electricity in a plant owned by it. In 1907 the company entered into a contract for the purchase of electric power and the result of the deal was that the old steam plant was dismantled and abandoned. The Commission valued the contract, the special master disallowed the item, and it was restored to the rate base by Judge Booth, who said:

"I am not able to agree with the master in his view. The contract was a thing of value and it differed from an ordi- [fol. 82] nary contract for current supplies. It took the place of a physical plant which would have otherwise been necessary and would have been valued as a part of the physical items. Under these circumstances, I think the commission was justified in including this power contract as an item in the rate base * * *.

"It may perhaps be open to question whether this matter of power contract and the dismantled plant might not have been treated as an unusual obsolescence and allowance made on that basis."

Pacific Gas and Electric Company vs. San Francisco did not concern a power contract but involved the proper valuation of certain patent rights through which manufacturing costs have been greatly reduced. It appeared that the utility paid about $46,000 for certain patent rights, the use of which rendered about $800,000 worth of the utility's property obsolete. The supreme court held that the amount of money actually paid to the inventors was not the proper measure of value. The question of how the patent rights should be valued was left open, the supreme court saying:

"Whether, under the peculiar circumstances here presented, the rates base should be fixed by adding to the agreed inventory some fair valuation of the patent rights,

or whether prompt recoupment should be allowed for the obsolescence caused by their introduction, or whether appellant should be saved from actual ultimate loss by some other feasible method, we will not undertake to determine upon the present record."

In the Valparaiso case, supra, the Supreme Court of Indiana held that a contract for the purchase of electric current held by the utility was a property right and should have been valued for the purpose of rate-making. The opinion further shows, however, that the utility, after entering into the power contract, was forced to abandon a part of its plant. It made the claim that as to this abandoned property it should be allowed to include the value thereof in the rate base or be permitted to amortize its value out of its earnings. The supreme court disallowed its claim, saying:

"It should not be included in the value of this plant for rate-making purposes because it is not actually used or useful in furnishing electricity. No allowance should be made for an amortization fund to take care of this sum."

This case is not inconsistent with the equitable rule above cited—it merely recognizes one method of handling superseded property. In the instant case the company never had [fol. 83] a plant and its contract with the Ohio Oil Company did not result in the supersession or obsolescence of any property.

St. Louis Railway vs. Hagerman, supra, did not involve a valuation for rate-making purposes. It was there held that a contract held by plaintiff to operate its cars over a certain bridge was a property right and taxable as such. We are not disposed to question the decision but find it of no value in this case where value for rate-making purposes is the subject of inquiry.

In re Crystal City Gas Company, supra, the New York Public Service Commission held that the amount paid by a natural gas company, under a contract, for the right to be furnished with natural gas from the fields of a producing company, and without which the utility could not carry on its enterprise, should be included as part of the cost of the plant and property. But, in so holding the Commission said:

"Our decision to include this payment as part of book cost has necessarily been founded upon the peculiar facts before us in this proceeding, and the decision thereon can form no precedent with respect to the inclusion of such payments in book costs generally or in the valuation thereof in proceedings where the facts are not similar to those in the proceedings before us."

The controlling fact in that case was that unless the utility had paid the $25,000.00 for the right to be furnished with natural gas from the field, it could not have undertaken or carried on its enterprise as the seller controlled the gas supply in the field. In the instant case, the utility has not paid out one cent for its contract nor does the Ohio Oil Company control the natural gas supply from the field.

In re Duluth Railway Company, supra, was a proceeding by the Minnesota Commission subsequent to the Federal court's decision (4-F (2d) 543, supra). The commissioned valued the power contract held by the railway but rested its valuation thereof squarely upon the unamortized value of the power plant of the railway company which was dismantled by reason of the company's entering into the power contract.

In re Kootenai Power Co., supra, it appeared that the utility purchased its electrical current for distribution under two contracts—one with the Washington Water Power Company and the other designated as the "Strat-[fol. 84] hern contract." Under the terms of the Strathern contract the utility purchased current at $1,750.00 per annum cheaper than it would have to pay under the Washington Water Power contract. The utility contended that its contract with the Washington Water Power Company was a fair and just one and that for its diligence in negotiating and concluding the Strathern contract it should be permitted to capitalize the savings at seven per cent or at $25,000.00. The Commission found the rates provided in the Washington Water Power contract were reasonable and that the utility was saving $1,750.00 annually by reason of the existence of the Strathern contract, which alleged savings capitalized at 8 per cent amounted to $21,875.00. As a reward for the utility's ability to conclude the Strathern contract it was permited, by a divided vote of the commission, to include one-half of the capitalized savings in its

rate base, the benefit of the other fifty per cent being assigned, according to the decision, for the benefit of the patrons of the utility. It will be noted from a reading of this decision that in the valuation of the Kootenai Power Company's property the commission did not assign any value to the utility's contract with the Washington Water Power Company nor did it value the Strathern contract. It will also be noted that the cost of current purchased under both contracts was charged to operating expenses.

It is obvious that the Kootenai decision when analyzed offers no support for the utility's contention.

Considerable evidence was introduced at the original hearing tending to show that the contract between the utility and Ohio Oil Company was improvident in that the rate charged by the Ohio Oil Company was excessive and unreasonable. It was shown that gas was purchasable in the field at from 3 to 5 cents per M. cubic feet at the well, and that the witness Johnson had offered to furnish natural gas at the city limits for 7 cents per M. cubic feet. In view of the fact that the Ohio Oil Company is now receiving 7 cents per M. cubic feet instead of the contract rates of 15 and 10 cents and because the record is in doubt as to the exact status of the contract of April 20, 1927, we withhold decision upon the providence or improvidence of the contract of April 20, 1927. The new rate of seven cents per M. cubic feet appears to be a reasonable rate and until it is [fol. 85] made the subject of direct inquiry, we will assume that it is not an unreasonable rate for the utility to pay for its gas supply at the city limits.

Land and Buildings

In Benjamin vs. Great Northern Utilities Company, 17 M. U. R. 487, P. U. R. 1924-B 705, we disallowed an item for $10,000 for "Land and property", on the ground that it did not appear that the land or property claimed as an asset was devoted to the gas service of the utility. We there made reference to the fact that "it appears in substance to have been the price which Williams paid James A. Johnson for all his property and rights when Williams secured the Johnson Electric plant on November 18, 1922." The utility now claims that of the ten thousand dollars paid Johnson, the sum of three thousand dollars should be allocated to the gas department as the value of its interest in

the land jointly used by it and the utility's electric department. In rejecting this claim it is sufficient to say that the value of such portion of the land, originally purchased from Johnson, as is properly allocated to the gas department will be valued on the basis of present market value and that the value of such portion of the buildings jointly used by the gas and electric departments as is properly allocated to the gas department, will be valued on the basis of reproduction cost new less depreciation. Both of these items are treated infra under the heading of "Value of Physical Plant."

Clearing Way for Gas Utility

Of the sum of ten thousand dollars paid Johnson, the utility claims that the amount of two thousand dollars was paid for clearing the way for the introduction of a gas utility in Shelby. Johnson testifies in this record that the consideration for the $10,000.00 was as follows: $2,500, for five lots adjoining the town of Shelby, a proposed electric plant site; $1,500, for the town lots and buildings thereon which housed his electric light plant; and, $6,000, for the electric light plant itself. As to the last mentioned figure, he states that it represented fifty per cent of the valuation placed on his plant by this Commission. Johnson is emphatic in his statement that the sale had nothing to do with bringing natural gas into Shelby. Whether or not [fol. 86] the utility, or its agent, purchased the Johnson Electric Plant with the thought in mind of supplying natural gas to Shelby, is immaterial as we view it, as it is evident from the record that the utility received full value for the $10,000 in land, building and equipment.

Improvements on Land and Buildings

Discussion of this item is made under the heading of "Value of Physical Plant", infra.

Plan and Construction

Engineering and Superintendence

For plan and construction engineering the utility claims an allowance in the rate base of $15,000, and for plan and construction superintendence the sum of $10,000. We dis-

allow both items. In our valuation of the plant on the basis of reproduction cost new, we have allowed four per cent as an overhead on all material and labor items, which we consider ample under the circumstances. We note in passing that when the utility's plant was valued in 1923 (Benjamin vs. Great Northern Utilities, supra), no claim was then put forward by the utility for such sums, nor was our order allowing the sum of $25.00 for engineering ever appealed from. That no such sums as is here claimed was ever expended by the utility is clear from the company's records which contain no entry to that or similar effect and that no such sums would be required to be expended in a reproduction of the present plant is also patent from the record.

Legal Expenses

The claim of $1,500.00 for alleged legal expenses incurred in connection with the organization of the utility finds no substantial support in the record as to amount. In accordance with the practice of the Commission to take care of legal and organization expenses through an allowance among the overheads, we reject the item of $1,500.00 for alleged legal expenses.

Value of Physical Plant

Land: As above indicated, the electric and gas departments of the utility are housed together in one office building and jointly use the company's warehouse. The lot upon which these buildings are situated are appraised by [fol. 87] various residents of Shelby, familiar with real estate values, at figures ranging from $750.00 to $2,500.00. Buck estimates its market value at $2,000.00, a figure which we believe to be substantially accurate. The land upon which the regulator station is situated is given a market value of $200.00. Buck's allocation of 55 per cent of the value of the office building lot to the gas department, based upon the ratio existing between the number of gas customers and electric consumers, is one of several methods that might have been employed. We are satisfied that his conclusion reflects a fair apportionment.

Buildings: Buck estimates the reproduction cost new of the office building at $4,012.46; the warehouse, $393.23, and the regulator station at $1,186.11. The utility offers no

reproduction cost figures nor any specific figures as to the value of these buildings. We adopt Buck's estimate of value and his apportionment of 54.5 per cent of the office building and 75 per cent of the warehouse to the gas department.

Distribution System: The utility does not question the inventory of its property as compiled by Buck. Its chief criticism of Buck's valuation of its distribution system—this also applies to services and meters—is that Buck makes no allowance for piecemeal construction and that his unit prices are too low. As to the former, it is clear that under a strict application of the reproduction method, there is no reason for the application of piecemeal methods as it is assumed that the entire property would be reconstructed by the quickest and most economical method. As to the latter, it is quite generally recognized that in the adoption of unit prices there is wide room for variation and error. (Final Report of Valuation Committee of American Society of Civil Engineers—Proceedings, 1917, page 1311.) As remarked by the authority last cited, "The unit prices on most of the items entering into a valuation are not capable of exact and absolute determination or proof. This is especially true of all items in which labor largely enters into the cost."

Buck places the reproduction cost of the distribution system, including overheads at 14 per cent, at $16,914.36. Using Foster's unit prices, same overheads as Buck, we arrive at $21,266.74. The disparity in the figures lies in the different costs allowed by Buck and Foster for labor in [fol. 88] laying of the mains. Buck's labor cost figures are the result of a study of actual cost data secured from similar undertaking at Havre, Chinook, and Glendive, Montana, consideration being given to wages prevailing at Shelby. Foster's estimate of labor costs is based upon a study of statistics compiled from previous valuations of natural gas plants made by him from work orders where the time consumed was shown and from studies made by street foremen in laying mains and setting meters.

Services: Buck estimates the present value of reproducing services, including overheads, at $4,761.55. Foster's estimate, using 14 per cent overheads, total $5,434.31. Again, the difference is laid to the use of different labor costs.

Meters and Regulators: Under this heading Buck has placed the reproduction cost new of meters, regulators, installations at electric plant and regulator station, at $14,559.75. Applying Foster's unit prices and 14 per cent overheads to meters and regulators installed (no question being made as to installation equipment), the total is $15,145.78.

It is perhaps true that Buck in the construction of unit prices has not given sufficient recognition to Shelby's proximity to the oil field and the influence that high wages in the field exerts on the price of labor at Shelby. In view of the fact that there has been no great fluctuation in material prices since the last valuation of the utility's gas plant and the further fact that its construction expenditures on its system indicate a much higher cost than Buck's estimate, we are inclined to view that under the particular circumstances of this record, the application of Foster's unit prices will more accurately reflect the reproduction cost to the above items.

Overheads: The utility contends for an allowance of 20 per cent to cover construction overheads as against fourteen per cent employed by Buck. We see no occasion to depart from our experience standard in this respect, which Buck has followed.

Depreciation: The utility makes no showing as to the amount of depreciation existing in its plant contenting itself with the assertion that it is rendering one hundred per cent service. But, as we have heretofore pointed out [fol. 89] (Re Union Electric Co., 21 M. U. R. —; P. U. R. 1928-E 396), the fact that a utility is rendering efficient service does not establish the fact that depreciation in its plant is non-existent. Buck has, after inspection, made an estimate of the per cent condition of the various units and we adopt his findings in this respect. Due to the fact that we have increased the estimated reproduction cost of certain items, above noted, the specific amount of depreciation as found by Buck must be corrected to $8,338.42.

Working Capital

Working Capital in a rate proceeding is quite generally held to be the amount of the capital which the investors are required to put into a business over and above the investment in plant and intangibles in order to cover the gap be-

tween cash expenditures in the production and delivery of service and the collection of revenue from the sale of service (Re Union Electric, supra; Whitten-Wilcox, "Valuation of Public Service Corporations", Sec. 780). In this case the utility claims the sum of $13,500.00 as a fair allowance in its rate basis for this purpose. Buck estimates the sum of $4,500.00 as being an outside figure—this to include material and supplies as well as cash working capital. The figure submitted by the utility was compiled by the company's auditor by taking operating expenses for a 45-day period, adding thereto the total of accounts receivable, material and supplies on hand, and cash in till and on deposit. Buck's estimate is influenced largely by the practice of certain utilities in setting aside a sum equal to one-ninth of its annual operating expenses, a practice based upon the assumption that it takes about six weeks to get in receipts from service sold. Buck also took into consideration the maximum amount paid in any one month for gas purchased, average monthly pay roll expense, and the quantity of material and supplies reasonably necessary to have on hand. We do not agree with either estimate. No hard and fast rule for determining the amount of working capital has been devised because each utility presents an individual case. In each case the working capital requirement is to be measured by the amount of funds necessarily furnished by the utility to keep operations running smoothly, safely and economically. This utility stands in a much different position than the one [fol. 90] that produces and delivers service and pays for the cost of production and delivery in advance of the receipts of its revenues therefrom. The principal items of the utility's operating expenses are cost of gas purchased and pay roll of officers and employees. Under its contract with the Ohio Oil Company, the utility settles for gas purchased on or before the 20th day of each month for all gas taken during the preceding month. Its meter-reading date for consumers is about the 23rd of each month and all customers' bill are due and payable on the first of the month next preceding the meter-reading date. The practical effect of the arrangement is that the utility receives considerable money from its customers upon a resale of the gas purchased by it from the Ohio company before it settles with the wholesaler. The utility does not provide

any discount for prompt payment but under our standard rules and regulations it has the right to insist upon reasonably prompt payment or to discontinue service upon twenty-four hours' notice, and in cases of doubtful non-property owning customers, to require a deposit in advance to cover an estimated 45-day bill. The utility asserts that during the past five years, delinquency in consumers' account has varied from $2,000 to $3,500, but if that is true, it bespeaks an indulgence on the part of the utility that is not chargeable to the customers in general. Our regulations, above adverted to, were designed to insure promptitude in payment and any burden caused by a waiver in their application is to be borne by the utility and not its patrons. In 1927, the utility disbursed in wages to its officers and employees the sum of $4,988.66, or an average of $415.72 monthly. Wages of officers and employees are properly payable promptly on the first day of the month next succeeding the month during which the services were performed and it is therefore necessary that the utility have on hand finances to meet the pay roll. It is likewise proper and essential that the utility have in the till or on deposit a cash balance sufficient to maintain credit and meet irregular demands that may arise, the amount of which is largely a matter of judgment under the facts and circumstances of each case. Consideration must also be given to the amounts of money the utility has on hand in its depreciation reserve, surplus and accrued taxes accounts. To the extent that the balance in the reserve at any time is [fol. 91] not invested in additions necessary to maintain the property as a whole in stable condition per cent of cost new, to the extent that the surplus represents money accumulated for dividends and not yet payable as such in the normal course and to the extent that it has been set aside in its accrued taxes account funds with which to meet its tax obligations not payable until the latter part of the calendar year, these funds tend to off-set working capital requirements. Taxes in Montana are payable for the calendar year, one-half on or before November 30th, of such year and the other half on or before May 30th, of the succeeding year. The utility, under our uniform classification of accounts system is required to set up on its books as an operating expense for January one-twelfth of the total taxes for that year, but not being under the neces-

sity of paying only one-half thereof on November 30th of that year, it has in its possession sums collected as revenue, ranging from a minimum of five months' tax accruals to eleven months. Assuming that the utility's taxes for 1927, namely, $1,437.23, is approximately its normal annual tax, it has a tax accrual of approximately $122.00 per month, or it has on hand at all times in this tax account a fund ranging from $610.00 to $1,342.00, which tends to reduce its working capital requirements, as deferred payments to plaintiff may be compensated in deferred payments by it.

Under its new arrangement with the Ohio Oil Company, its annual cost of gas purchased is reduced approximately fifty per cent. Upon the assumption that the amount of gas purchased for the twelve months ending August 31, 1928, is typical, its cost would be $9,800.00, or an average of $816.67 per month, as against an average monthly cost of $1,785.42 for 1927. But it is apparent from the record that unless conditions change, the utility will not purchase nor sell as much gas in the future by reason of the competition offered by the Citizens Gas Company, which has already acquired some 135 former customers of the utility. Under the circumstances of the record we find that $1,250.00 is a fair allowance for cash working capital.

As to the amount of supplies and materials that should be allowed for in working capital, this also is a matter of judgment based upon the actual requirements of the utility. A mere inventory of material and supplies on hand at any [fol. 92] given period is not conclusive and often not even persuasive of the proper amount to be allowed. Material and supplies carried in stock by the utility for the purpose of making repairs, installations, etc. are as much a part of its property devoted to the public service as is its main plant. It is of utmost importance that there be no cessation in public service and that a prospective consumer wishing to attach himself to a utility's service should not be postponed in securing a connection. Having in mind the size of the plant herein involved, the fact that the utility undertakes no obligation with reference to the pipe line leading from the gas wells to the city limits, the number and location of its customers, and all other factors that affect the situation, we are of the opinion that $1,250.00 is a fair allowance for material and supplies.

Cost of Financing

With respect to cost of financing, we disallow the utility's claim in accordance with the views expressed in re: Natural Gas Rates for Great Falls, supra.

Going Concern

The valuation of the utility's property herein is made on the basis of it being a going concern. For the reasons state in re: Union Electric Co., supra, we decline to make any specific allowance for going concern value.

Present Fair Value

From the above findings we conclude that the present value of the utility's property, used and useful, at Shelby, Montana, devoted to natural gas service for the convenience of the public as of January 1, 1928, was $43,214.22. Construction expenditures between January 1, 1928, and August 31, 1928, amounted to $2,877.50. At the December 20th hearing, the manager of the utility advised the Commission that the value of its property was the same as stated by the witness Foster at the October 1st hearing. Thus, by adding the actual construction expenditures for 1928, without deducting any depreciation, we arrive at the sum of $46,091.72, as the present value of the utility's property as of the last date of inquiry. The following table summarizes our findings to reproduction cost new, depreciation and present value:

[fol. 93]

Item	Reproduction cost	Depreciation	Present value
Land	*$1,300.00	.....	*$1,300.00
Buildings:			
(a) Office and warehouse	2,481.71	$248.17	2,233.54
(b) Regulator houses	1,186.11	59.30	1,126.81
Distribution:			
(a) Mains	21,266.75	4,253.35	17,013.40
(b) Services	5,434.31	1,902.01	3,532.30
Meters and Regulators	15,145.78	1,514.58	13,631.20
Shop Tools	395.24	197.62	197.62
Office Equipment	600.61	30.03	570.58
Miscellaneous:			
(a) Car	285.00	85.50	199.50
(b) Telephone	957.13	47.86	909.27
Additions in 1928	2,877.50	.....	2,877.50
Totals	$51,930.14	$8,338.42	$43,591.72
Working Capital			2,500.00
Total present value of gas utility			$46,091.72

* Market value.

Revenues and Expenses

The annual report of the utility for the calendar year 1927 shows the following revenues and expenses:

Total Operating Revenues:		$59,563.04
Operating Expenses:		
Production	$21,425.12	
Distribution	2,321.35	
Commercial	3,298.73	
General	9,451.16	
Undistributed	1,067.37	
Depreciation	3,000.00	
Taxes	1,473.36	
Total Operating Expenses		42,037.09
Net Operating Revenue		$17,525.95

Our analysis of the utility's books for the twelve-month period ending August 31, 1928, shows revenues and expenses as follows:

Total Operating Revenues	$52,965.65
Total Operating Expenses	39,061.68
Net Operating Revenues	$13,903.97

Foster in his exhibits sets up revenues and expenses for the same two periods, as follows:

[fol. 94]

	1927	12 months ending Aug. 31, 1928
Total Operating Revenues	$59,563.04	*$51,958.74
Total Operating Expenses (including taxes but excluding depreciation)	39,037.09	†35,512.04
Net Operating Revenue	$20,525.95	$16,446.70
Deduct Fed. Income Tax	878.12	1,466.71 (est.)
Total available for depreciation and return	$19,647.83	$14,979.99
Fair allowance for depreciation	4,470.52	4,700.72
Total available for return	$15,177.31	$10,279.27

* Adjusted to reflect rates that went into effect October, 1927.
† Adjusted to reflect cost of gas under April 20, 1927, contract.

Whether we accept the figures from the annual report, Buck's compilation or Foster's set-up, it is apparent with-

out any further analysis that upon the rate base we have found herein as representing the fair value of the utility's gas property, the rate of return to the utility has been unreasonable and excessive, justifying the conclusion and finding, which we hereby make, that the rates that were in effect when this inquiry was commenced and the rates that were approved tentatively pending completion of this investigation were and are unjust and unreasonable rates.

In conection with the revenues of the utility we note monthly charges against the electric department for gas furnished to it by the gas department. Taking December 1927, for example, the records of the utility show that during that month the electrical department used 3,804,700 cubic feet of natural gas for which the gas department received a credit of $570.70, which figures out at the rate of 15 cents per thousand cubic feet, which was the contract price at that time for any amount less than five million cubic feet. The practical effect of selling gas to the electrical department at contract price is to prefer electrical consumers to the prejudice of gas consumers. It requires extra mains and equipment to serve the electrical department. These are carried as part of the gas investment. The gas consumers not only carry the added investment upon which they are required to pay a fair return, but [fol. 95] must likewise carry the burden of depreciation and taxes on the increased investment, maintenance expense on the additional equipment and leakage in the mains, specially required to serve the electrical plant. The utility doubtless has the right to furnish its electrical department with gas at cost but that cost must truly reflect all items that properly enter into a determination of cost. That this item is of no small consideration is apparent from the fact that during 1927 practically 21 per cent of the total gas purchased during the year was transferred to the electrical department and settled for on the basis above suggested.

Comparing operating expenses of the utility for 1927 with previous years, we find that the operating expenses, exclusive of cost of gas purchased and depreciation, have, in the aggregate, taken a decided upward trend. To illustrate: In 1924, the total operating expenses of the utility (less cost of gas purchased and depreciation), amounted to $10,019.03; in 1925, $11,670.11; in 1926, $12,558.94; whereas,

in 1927, it totaled $17,511.97, and for the twelve-month period ending August 31, 1928, amounted to $18,528.16. Part of the abnormal increase reflected in the last two figures is to be found in the alleged expense incurred by the utility in connection with our hearing of November 29, 1927. According to the utility's books, it expended $4,386.25 in connection with this hearing. The largest single item is for alleged "special services Chicago office", in the amount of $2,849.27. Neither the records of the company in Montana, nor the testimony of the witnesses for the utility, offer any itemization or reasonable explanation of the charge, nor can we from an examination of the transcript of that hearing find any such special services. In view of the fact that after paying all of the alleged expenses incurred in connection with the first hearing, the utility was able to and did earn an excessive rate of return, we do not feel called upon to say any more than that if the merits of payments to the Chicago office for alleged special services becomes material in any future proceeding on the question of whether or not the utility is earning a fair return, before the Commission will accept such payments as legitimate operating expenses, it will require proof of actual service and evidence of the reasonable value thereof. Ordinarily, [fol. 96] the costs legitimately incurred in connection with a rate proceeding should not be paid out of current revenues but should be amortized over a reasonable term of years.

Docket No. 1028

In justification of its schedule 4-A sheet 2, the utility develops of record the fact that it has been engaged in the distribution of natural gas at Shelby since the forepart of 1923; that prior to the month of October, 1928, it was the only utility furnishing such service at Shelby; that during October, 1928, the Citizens Gas Company completed the construction of a distributing system at Shelby and commenced selling natural gas in competition with the Great Northern Utilities Company, at a schedule of rates lower than the Great Northern's, the base rate of the new company being 15 cents per thousand cubic feet lower than that of the Great Northern's; that with the advent of the Citizens Gas Co. into the utility's field, the Great Northern

lost to the Citizens Gas Company, 137 customers, two of which had been recovered at date of hearing, and that in order to protect its investment in its gas property at Shelby it has decided upon a schedule of rates commencing with a base rate of 15 cents lower than the base rate of its competitor. No evidence was introduced tending to show the utility's probable operating revenues and expenses under the new schedule. So far as the manager of the utility was informed by the Chicago office where the proposed schedule was drawn, no rate study was prepared in connection with the new tariff. In his opinion the rate proposed is not a reasonable one from the utility's standpoint but is justified under the competitive conditions existing at Shelby. To quote his language from the record:

"Rate regulation is just and equitable under ordinary conditions but a competitive situation has arisen at Shelby which forces the Great Northern Utilities Company to protect its investment in the most thorough manner possible and we are willing, if required, to forego for the present the net earnings to enjoy the greatest ultimate benefit."

He further stated that in the event the Citizens Gas Company should meet the new rates as proposed in Schedule 4-A, the utility would propose further reductions. In other words, the utility has thrown down the gauntlet of [fol. 97] battle to its competitor and insists upon a fight to a finish.

At the outset, the utility takes the position that the Public Service Commission Act (Chapter 52, Laws of 1913: Sections 3879 to 3913, inclusive, R. C. M. 1921), does not contain any grant of power to this Commission authorizing it to make and enforce minimum as distinguished from maximum rates or to prescribe specific rates and that a public utility is free to charge any rate it may see fit provided that such rate does not exceed a maximum reasonable rate. If the utility is correct in its contention, the Commission has no choice in the premises but to approve schedule 4-A as the rates stated therein are admittedly below the level of a maximum reasonable rate.

It therefore becomes necessary to examine the provisions of the Public Service Commission Act to determine whether or not the legislature has in its provision for a comprehensive and uniform system of regulation and control of public

utilities by the state through this specially created tribunal limited the Commission in rate matters to the establishment of reasonable maximum rates. It is settled law that agencies such as a Public Service Commission have "such powers and such only as are conferred upon it by statute either expressly or by necessary implication." (C. M. St. P. Ry. Co. vs. Board of Railroad Commissioners, 76 Mont. 305; 247 Pac. 162), and that "the Commission is a mere administrative agency created to carry into effect the legislative will. It has only limited powers, to be ascertained by reference to the statute creating it, and any reasonable doubt as to the grant of a particular power, will be resolved against the existence of the power," (State vs. Boyle, et al., 62 Mont. 97; 203 Pac. 378).

Section 5 of the Act (3883) provides that "the charge made by any public utility for any heat, light, power * * * produced, transmitted, delivered or furnished, or for any service to be rendered as or in connection with any public utility, shall be reasonable and just, and every unjust and unreasonable charge is prohibited and declared unlawful." Section 11 of the Act (3891) provides that every public utility shall file with the Commission schedules, open to public inspection, showing all rates, tolls, charges, which it has established, and that "no change shall thereafter be [fol. 98] made in any schedule * * * except upon twenty days' notice to the Commission, and all such changes shall be plainly indicated upon existing schedules, or by filing new schedules in lieu thereof ten days prior to the time the same are to take effect; provided, that the commission, upon application of any public utility, may prescribe a less time within which a reduction may be made; *provided, however, that no advance or reduction of existing schedules shall be made without the concurrence of the commission.*" Section 12 (3892) provides that "it shall be unlawful for any public utility to charge, demand, collect or receive a greater or less compensation for any service performed by it within the state, or for any service in connection therewith, than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, or to demand, collect, or receive any rate, toll or charge not specified in such schedules. The rates, tolls and charges named therein shall be the lawful rates, tolls and charges until the same are changed, as provided in this act." Sec-

tion 17 (3898) provides, among other things, for the filing of complaints, by parties directly interested, against unreasonable or unjust rates and for hearings thereon. Section 19 (3899) authorizes the Commission, "If, upon such hearing * * * the rates, tolls, charges, schedules * * * shall be found to be unjust, unreasonable or unjustly discriminatory * * * *the commission shall have the power to fix and ordered substituted therefor, such rate or rates, tolls, charges or schedules, as shall be just and reasonable.*" The same section authorizes the commission to proceed upon its own motion to investigate rates, etc., and after a full hearing "by order make such changes as may be just and reasonable, the same as if a formal complaint had been made." Section 25 (3905) declares that "All rates, fares, charges * * * fixed by the commission shall be enforced, and shall be prima facie lawful, from the date of the order until changed or modified by the commission", or by order of court upon a proper review of the commission's actions.

Construing the Act so as to give effect to all its parts, the conclusion appears inevitable that it was the intention of the legislature to clothe the Commission with the power to regulate rates and to fix a specific rate, instead of a mere [fol. 99] maximum. The provision that we shall have the right to fix and substitute just and reasonable rates, after investigation and hearing, for rates being charged by a utility and the express declaration that no advance or reduction of existing schedules shall be made without the concurrence of the commission bespeak a legislative intent wholly at variance with the utility's contention herein. It is only reasonable to assume that if the legislature intended that the Commission should only have the power to fix maximum rates that it would not have placed any restrictions upon reductions in rates below the level of existing schedules except the requirement that such reductions be filed with the Commission. The fact that a reduction in existing schedules cannot be made without the concurrence of the Commission clearly indicates that such a reduction cannot be made as a matter of right. As was pointed out by the Supreme Court of Montana in Northern Pacific Ry. Co. vs. Bennett, decided December 27, 1928, "the requirement that a person must secure leave from some one to entitle him to exercise a right, carries with it, by irresistible

implication, a discretion on the part of the other to grant it, if in his judgment, it is improper or unwise to give the required consent." In determining whether or not the Commission shall concur in a proposed advance or reduction in existing schedules, our judgment is to be measured by the provision that rates charged by a utility shall be just and reasonable—fair to the consumer and fair to the utility.

It is conceded that the rates embodied in Schedule 4-A will not yield a fair return to the utility. Further, the record supports the finding that the prof-erred rates will not even yield enough revenues to defray normal operating expenses, including a fair allowance for depreciation, under existing conditions at Shelby, nor would they provide sufficient income to cover normal operating costs if conditions were the same now as they were during the calendar year 1927 when the utility sold more natural gas than it had during any year since its entry into the utility field. Assuming that the utility has the right to waive its right to a fair return, or any part of it, it is apparent to us that it cannot waive its rights to such an extent as to imperil or [fol. 100] impair its ability to render dependable, adequate service to the public it serves. It is a primary duty of a public utility to properly maintain its plant and equipment to the end that it can render adequate service to the residents of the territory it professes to serve. Quality of service and freedom from interruptions in service are just as important to consumers as are reasonable rates. In this modern day communities have become so dependent upon services furnished by public utilities for the successful prosecution of industries and for use in the home that any impairment in efficiency or continuity of service would not only result in serious inconvenience but in many cases downright hardship. The utility must look to its rates to provide its operating expenses. If they are insufficient, curtailment or entrenchment generally ensues; competent personnel is often replaced by mediocre and less expensive employees; ordinary repairs are neglected; inferior materials are used in making absolutely necessary repairs and retirement of units, worn in the service, postponed, all tending to affect the quality of the service and to render probable serious interruptions in the service. So it is perfectly plain to us that any rate schedule that would tend to

produce such results is detrimental to the public interests and therefore unjust and unreasonable. By reason of the findings and views hereinabove expressed we conclude that the rates set forth in schedule 4-A sheet 2 are unjust and unreasonable and we therefore decline to concur in or approve the same.

It has been the practice of this Commission in the past in cases involving the establishment of rates for utilities engaged in rendering the same character of service in the same locality to determine a just and reasonable rate for application in the particular locality and require both utilities to serve at that rate (Public Service Commission vs. Blue Flame Gas Company, 19 M. U. R. —; P. U. R. 1926-D 777). This same view has been expressed by other public utility commissions (Re: Los Angeles Gas and Electric Corp., P. U. R. 1927-C 545; Re: Southern California Gas Company, P. U. R. 1919-D, 155, P. U. R. 1918-A, 604; Re: Street Railway Rates (D. C.) P. U. R. 1921-E 13; Pacific Gas and Electric Co. vs. Great Western Power Co., 1 Cal. R. C. R. 203).

[fol. 101] The following quotation from the Blue Flame Gas case, supra, is apropos of the present situation:

"However, it has been conclusively demonstrated in almost every small community where the experiment has been tried, that the grant of franchises to competing public utilities is wrong in principle and invariably results in unsatisfactory service. Competition has long ceased to be potent as a regulatory factor in public utility operations. Where it was relied upon, it proved to be had in the long run for consumers of utility service, as it too often meant duplication of facilities in a field not large enough to support more than one company. The usual outcome of this was consolidation, followed by recoupment by means of high rates of losses due to competition. It has taken a long time for the public to understand that competition as a regulator of charges in the public utility industry is a failure, and even now, the fact is not appreciated by casual observers. (1 Spurr on "Guiding Principles of Public Service Regulation").

"We would feel recreant to our duty if we did not in unmistakable terms denounce the admission of competing public utilities into small communities such as Kevin. The

sooner this idea is abandoned and reliance placed upon the power of the State to secure adequate service, and by appropriate rate regulation cure the natural tendency of monopolies, the better will be the service rendered by many public utility owners in small Montana towns, whose plans for improving and extending their service are constantly harassed by suggestions of the admission of competitors. Under existing law the Commission must recognize the right of both corporations to serve the community of Kevin, and in so doing, it must make rates influenced by competition. Were we to promulgate schedules having exact relation to the value of the property devoted by each corporation to the service, one schedule would undoubtedly be lower than the other, with the result that the utility serving at less cost would enjoy a legal advantage over its competitor. Even our wide-open system of franchises does not seem to countenance such a result. At the very least those who undertake such services are entitled to the good faith of city councils and non-confiscatory treatment by this body. In keeping with our recorded practice, we shall approve the same rates for both utilities and leave the question of survival to the ability of one management or the other to render a superior and more attractive service than that rendered by its competitor."

Our attention is called to a recent decision of the Supreme Court of Utah (Logan City vs. Public Utilities Commission of Utah, 271 Pac. 961), in which the court was called upon to review the action of the Utah Commission in placing the municipally owned electric plant of Logan City upon the same rate basis as the Utah Power and Light Company, which also served consumers residing in Logan City. The action of the commission in so far as it fixed rates for the City of Logan's municipal plant was annulled, the high court holding that under the Utah constitution the Public Utilities Commission had no authority to fix rates for municipal plants even though it be assumed that a [fol. 102] municipal plant fell within the definition of a public utility as found in the Public Utilities Act. Wholly by way of obiter dictum, as we view the decision, a majority of the court took the commission to task for placing the two utilities—one privately owned, one publicly owned—on the same rate basis. While there is language in the de-

cision tending to support the views herein urged by the utility, we are not impressed with the applicability of that case as a precedent to be followed herein for several reasons. In the first place, and this is the controlling consideration, the Public Utilities Act of Utah (Chap. 47, laws of 1917), does not contain a provision with respect to the right of a utility to change existing schedules such as is found in our law (cited supra). Under Section 3 of the Utah Act, it appears that a public utility can change its schedules upon 30 days' notice to the Commission and public in the manner and form prescribed. There is no provision that the Commission must concur in changes. Secondly, the fact that the dispute was between a municipally owned plant and a privately owned utility renders it distinguishable from the instant proceeding. As to the suggestion in the decision that the Commission should have fixed a maximum rate beyond which neither competitor could go in establishing rates with the privilege in each to render service at a lower rate, we believe it to be wholly at odds with the modern trend of thought in public utility regulation (Idaho Power and Light Co. vs. Blomquist, 141 Pac. 1083, 1089, 1090; Guilding Principles of Public Service Regulation by Spurr, Vol. 1 p. 1). It is particularly so, in our judgment, because the Utah Act has the provision requiring a utility to secure a certificate of public convenience and necessity before entering into the public utility field in a given territory. Idaho has a Public Utilities Act substantially similar to Utah, yet its Supreme Court, in Idaho Power and Light Co. vs. Blomquist, supra, draws conclusions to the effect and intent of its act directly at variance with the Utah decision. We quote, with approval, from the Idaho decision:

"* * * there never can be any permanent competition in matters of this kind.

* * * * * * *

[fol. 103] "Under these various utility acts, the commission is generally given power to regulate rates and fix a specific rate, instead of a mere maximum, and that took away the opportunity for rate cutting, one of the principal instruments of warfare between such corporations. Under the act in question, the commission is given power to fix the

rate absolutely, and neither of the competing companies can charge more or less than the rate fixed.

* * * * * * *

"The rate to be determined in each case is a reasonable rate—a rate fair to both the consumer and supplier.

* * * * * * *

"If rates are absolutely fixed by the commission, with no permission to the utilities corporations to charge more or less, the public can receive no advantage from competition. Experience shows that while the people, or some of the people, may receive a temporary advantage from cut-throat competition, the general public can receive no substantial advantage therefrom."

See also: Economic Gas Co. vs. City of Los Angeles, et al., 168 Cal. 448; 143 Pac. 717; Ann. Cs. 1916-A 931.

The matter of prescribing just and reasonable rates under conditions of competition such as we find here is not free from considerable difficulty. A "just and reasonable rate" within the meaning of the statute, supra, is in the nature of things incapable of precise definition as is any expression containing the words "just and reasonable". We are constrained to agree with the Supreme Court of Kansas when it says (State vs. Southwestern Bell Telephone Co., 115 Kansas 236; 223 Pac. 771):

"If a reasonable rate could be exactly and accurately defined, much of the difficulty attending rate regulation would be solved."

Perhaps one of the best definitions of a just and reasonable rate to be found in the cases is the definition given by Justice Swayze in Public Service Gas Co. vs. Board of Public Utility Commissioners, et al., 84 N. J. L. 463, 87 Atl. 651, affirmed 87 N. J. L. 581, 95 Atl. 1079*, where the learned jurist said:

"The next question is whether the rate fixed was just and reasonable. On the one hand a just and reasonable rate can never exceed, perhaps can rarely equal, the value of the service to the consumer. On the other hand it can never be made by compulsion of public authority so low as to

amount to confiscation. A just and reasonable rate must certainly fall somewhere between these two extremes, so as to allow both sides to profit by the conduct of the business, and the improvement of methods and increase of efficiency. Justice to the consumer, ordinarily, would require [fol. 104] a rate somewhat less than the full value of the service to him; and justice to the company would, ordinarily, require a rate above the point at which it would become confiscatory."

Substantially, this is the same definition given in State vs. Southwestern Bell Tel. Co., supra, where the court said:

"Neither rates that do not yield a fair return nor rates that are prohibitive can be said to be reasonable. * * *

* * * * * * *

"A rate that will not permit an adequate return on the value of the property used to produce the service for which the rate is charged, where the user is not required to pay the full value of the service rendered, may safely be said to be unreasonable. A rate that is so high that those who are free to accept the service or refuse it will refuse to take it rather than pay the rate charged, may be safely said to be unreasonable. Somewhere between these two extremes lies a reasonable rate. For the purposes of this case, a reasonable rate may be defined as one which provides an adequate return on the value of the property used in producing the service, and which, where patrons may accept or refuse the service, as they choose is low enough to induce all who desire the service to pay the rate. In this attempt at definition it has been assumed that the telephone exchanges in controversy have been built where they are needed; that they have been properly constructed; that they were economically built; and that they have been well managed."

The above quoted definitions and the authorities generally recognize the rule that a public service company furnishing natural gas (or other product or service) to the public is entitled to a fair rate upon the present fair value of its property used and useful in the public service, to be ascertained at the time the service is rendered. They also recognize the limitation upon this rule, namely, that

a utility will never be permitted to charge more than the worth or value of the service which it is rendering. (Elkins vs. Public Service Commission (W. Va.) 135 S. E. 397; Alexandria & W. Ry. Co. vs. Railroad Commission (La.) 79 So. 863; Smythe vs. Ames, 169 U. S. 466; San Diego Land and Town Co. vs. National City, 174 U. S. 139; Covington and Lexington Turnpike Road Co. vs. Sanford, 164 U. S. 578; Darnell vs. Edwards, U. S. 564; Simpson vs. Shephard, 230 U. S. 352; Guilding Principles of Public Service Regulation, by Spurr, Vol. 3, p. 528; Groninger on Public Utility Rate Making, 145; Valuation of Public Service Corporations by Whitten (as revised by Wilcox) Sec. 872.) Were we to attempt to apply the principle of a fair return upon a fair value in this case, we would arrive at a manifestly exorbitant rate. The duplication of plants at Shelby has increased the capital investment in property devoted to the [fol. 105] public service but it has not increased one whit the value or worth of service to the consumer. To the extent that the existence of the two systems has resulted in the employment of property in the public service in excess of that reasonably required in the public service, it presents a case similar to one of overinvestment by a public utility, where it is rightfully recognized that the burden of overinvestment must not be shifted onto the shoulders of the consumers. Unrestricted competition tends to temporarily depress rates below the plane of reasonableness. Under free competition utilities feel compelled to accept business which pays for the direct cost and very little more. On account of the difficulty of estimating even the direct cost they sometimes accept business at prices returning less than the direct cost. Under a system of regulated competition the self-destructive nature of free competition is eliminated. Competition becomes a matter of furnishing better or more attractive service by the respective competitors rather than the sale of products or service at lower prices. The reasonableness of the rate charged for service is or should be based primarily upon its inherent reasonableness to the consumer. It is inevitable that two companies serving a territory that legitimately offers but enough business for one of the companies to operate on at a fair profit will have to respectively accept a return that will be less than a fair return under ordinary conditions. The rate or rates permitted to be charged must, in our judgment, re-

fleet the fair cost of serving the consumer plus a fair allowance for return.

Referring, then, to the situation at Shelby, we find from the record that the community affords an annual natural gas consumption of approximately 120,000,000 cubic feet; that natural gas is purchasable at the city gates at 7 cents per M. cubic feet; that by reason of line losses, estimated at 10 per cent, the utility is only able to deliver 900 cubic feet of each 1,000 cubic feet purchased, thereby making the cost per thousand cubic feet of gas sold 7.777 cents.

We know from the annual reports of the utility as well as from some of the exhibits in this record that the experience of the utility shows that, exclusive of the cost of gas [fol. 106] purchased, it costs (without any consideration of cost of maintaining a proper depreciation reserve) from 12.25 cents to 15.49 cents per thousand cubic feet of gas sold to do business. The following summary illustrates the utility's experience in this regard.

Year	M. cu. ft. of gas sold	Operating costs other than cost of purchase	Cost per M. cu. ft. sold
1924	72 233.3	$10,019.03	13.87 cents
1925	93 246.3	11,670.11	12.51 "
1926	102 540.2	12,558.94	12.247 "
1927	129 434.4	17,611.97	13.6 "
1928*	119 611.1	18,528.16	15.49 "
Average cost			13.543 "

* 12-month period ending August 31, 1928.

It would thus appear that the cost of gas purchased and cost of doing business (taking the average cost above as approximately correct), when translated into cost per thousand cubic feet of gas sold amounts to 21.32 cents. To this must be added the cost of maintaining a proper depreciation reserve fund, a cost universally recognized as a proper charge to operating expenses. In the former hearing 8 per cent was fixed as the depreciation annuity for this utility. On that basis and our findings above a fair allowance for depreciation is $3,383.34. Distributing that cost over 120,000 M. cubic feet it amounts to 2.82 cents per M. cubic feet of gas sold. Rate of return at 8 per cent on the present value of the utility's property amounts to $3,687.33, or about 3 cents per M. cubic feet of gas sold. Aggregating the above costs per thousand cubic feet of gas sold, it appears that a schedule of rates that will yield an average revenue of 27.13 cents per M. cubic feet sold would, under ordinary circumstances, represent a schedule of rate that is

capable of earning enough revenues to pay all operating expenses, including depreciation, and a fair return upon the value of property necessarily required to render adequate natural gas service to the consumers of Shelby.

A consumers' analysis compiled by Buck reveals the following facts regarding consumption and revenue:

[fol. 107]

Block M. cu. ft.	Total M. cu. ft., sold	Revenue	Per cent of total Gas sold	Per cent of total Revenue
0 to 3	1 541.4	$1,564.98	1.23	2.843
3 to 10	10 739.10	5,550.52	8.54	10.086
10 to 20	23 895.60	11,513.25	19.02	20.921
20 to 50	37 345.1	16,784.52	29.72	30.499
50 to 300	37 254.4	14,543.23	29.65	26.427
Over 300	14 888	5,075.15	11.84	9.222

It thus appears that while approximately 58.5 per cent of the consumption has been in the blocks below 50,000 cubic feet monthly consumption, approximately 64.35 per cent of the revenue has accrued from this source. A rate schedule, responsive to the above analysis, that will yield approximately 27 cents per thousand cubic feet of gas sold, should—employing the type of block schedule now in effect—be as follows (all rates net and subject to a minimum bill of $1.50, the present minimum):

First	10,000	cubic	feet	per	month	.....	35c	per	M.	Cu.	Ft.
Next	10,000	"	"	"	"	.....	30c	"	"	"	"
Next	30,000	"	"	"	"	.....	27.5c	"	"	"	"
Next	250,000	"	"	"	"	.....	25c	"	"	"	"
All over	300,000	"	"	"	"	.....	22.5c	"	"	"	"

This schedule of rates is in our judgment a schedule of just and reasonable rates. What rate of return such a schedule will yield under the competitive conditions now existing at Shelby will depend largely upon the ability of the management to attach new customers, increase consumption among present consumers and to effect such economies in operation as are consistent with adequate service.

An appropriate order will be entered.

Order

At a session of the Public Service Commission of Montana, held in its office in the Capitol, Helena, Montana, Tuesday, January 22, 1929, present Chairman Boyle and Commissioners Young and Dennis, there regularly came before the Commission for final action the matters and

things involved in Dockets Nos. 991 and 1028, and it appearing that the Commission has this day issued its report herein, which report is hereby referred to and of this order made a part, and that all matters and things involved have been duly investigated and a public hearing had whereat all persons interested had opportunity to appear and present their respective interests, and now the Commission [fol. 108] being fully advised in the premises,

It is ordered that Schedule 4-A, sheet 2, filed by the Great Northern Utilities Company with the Commission on November 19, 1928, stating rates for natural gas service available for all classes of service at Shelby, Toole County, Montana, be not concurred in and that said schedule 4-A, sheet 2, shall be, and it is hereby disapproved and rejected.

It is further ordered that the Great Northern Utilities Company shall on or before the first day of February, 1929, file with the Commission a schedule of rates for natural gas service at Shelby, Montana, effective as of February 1, 1929, and until further order of the Commission, which schedule of rates shall be embodied in a tariff known as Tariff No. 4, as follows, to-wit:

First	10,000 cubic feet per month	35c	per M. cu. ft.
Next	10,000 " " " "	30c	" " " "
Next	30,000 " " " "	27½c	" " " "
Next	250,000 " " " "	25c	" " " "
All over	300,000 " " " "	22½c	" " " "

Minimum Bill: $1.50.

It is further ordered that the Secretary shall serve a true copy of this report and order upon each of the parties hereto, and that the same shall be in full force and effect forthwith according to its terms.

Daniel Boyle, Chairman; Lee Dennis, Commissioner, Being and Constituting a Majority of the Public Service Commission of Montana.

Attest, official:

Francis A. Silver, Secretary. (Seal.)

Commissioner YOUNG:

I dissent. I cannot agree with the majority in ordering in the above rates. I am not concerned about the so-called "rate war" in Shelby but am interested in obtaining the very best rates for the consumers, and when a utility voluntarily reduces its rates, as in this instance, I am in favor

of giving the customers the benefit of the reduction instead [fol. 109] of denying them the relief offered. In my humble opinion, the Public Service Commission Law was not passed to prohibit rate reductions. Therefore, I wish to be recorded as voting for the approval of schedule 4-A proposed by the utility naming 20 cents per M. cubic feet for the first 300,000 cubic feet, and 15 cents per M. cubic feet for all over, which is almost one hundred per cent lower than the rates ordered established by the majority of the commission.

Leonard C. Young, Commissioner.

[fol. 110] STIPULATION

That it was stipulated in open court before the Examiner by counsel for plaintiff and counsel for defendants that the qualified denial of defendants, set forth in their Answer with reference to paragraph IX of the Bill of Complaint is intended to deny and may be construed only as raising the issue as to whether or not the plaintiff herein has complied with Section 3 of the franchise ordinance, same being attached as Exhibit "A" to Bill of Complaint herein, and that otherwise the said denial is not intended to raise any issue as to plaintiff's compliance with other terms contained in said franchise ordinance.

Testimony of R. O. MacPhillips

Whereupon R. O. MACPHILLIPS was duly sworn and testified upon behalf of the plaintiff, as follows:

Direct examination:

My name is R. O. MacPhillips; I have been connected with the Great Northern Utilities Company as superintendent for about nine years continuously last past, with headquarters at Shelby. I have continuously resided in Shelby during these nine years and maintained my home and residence there. I have been in active charge of the Great Northern Utilities Company property at Shelby, as distinguished from property of this company elsewhere during all of the period since October, 1928, when and after the competitive

situation developed here in Shelby. I have prepared for this hearing an exhibit showing the gas mains in place of the Great Northern Utilities Company and Citizens Gas Company and the status of customers attached to each of the lines of the companies.

The exhibit, which has been identified by the reporter as Plaintiff's Exhibit No. 2, consists of two sheets, sheets 1 and 2, and the said exhibit correctly shows of my own knowledge the situation with reference to the gas line of the competing company and the present status of customers attached as of the date of the map, to-wit, September 9, 1932.

[fol. 111] The map of the City of Shelby is a tracing made by myself; the mains of the Great Northern Utilities Company were drawn on the exhibit from information taken from the company's records; the mains of the Citizens Gas Company were drawn in from information from my personal knowledge. I also have personal knowledge of the mains of the Great Northern Utilities Company. I was present when all of them were installed and have superintended them since their installation. I have personally observed the status of the mains of the Citizens Gas Company and have followed that installation closely as it was being prosecuted.

On plaintiff's exhibit No. 2, the mains of the Great Northern Utilities Company are represented by solid black lines and the mains of the Citizens Gas Company are marked by broken dotted lines. Meter installations of the Great Northern Utilities Company are represented by a circle and the meter installations of the Citizens Gas Company are represented by a cross. Wherever there appears upon the exhibit a cross surrounded by a circle, that signifies that is a customer that the Citizens Gas Company has attached to its system that was never served by the Great Northern Utilities Company. By that I mean new gas users, representing wholly new business to the Citizens Gas Company which at no time were served by the Great Northern Utilities Company. The customers of the Citizens Gas Company designated by a cross on this exhibit, represent customers formerly belonging to Great Northern Utilities Company which were taken by the Citizens Gas Company between the time the competition commenced in October, 1928, and the

date of the map. This information, of course, changes and changes may occur while this very hearing is going on but the exhibit is true in this respect as of the date of the map.

With reference to extensions and additions to its mains, Citizens Gas Company has added to their mains since July, 1930.

Referring to plaintiff's exhibit No. 2, the main over Blaine Avenue was extended from the corner of North Granite [fol. 112] Street for an approximate distance of 300 feet. The main on Second Street South was extended from the alley east of First Avenue approximately 450 or 500 feet. These mains are uniform in size and character to the main system to which they are attached. There have not been any extensions by the Great Northern Utilities Company since July, 1930. There have been two small extensions by the Great Northern Utilities Company since competition started; these extensions total in footage approximately 200 feet all told.

From this map, plaintiff's exhibit No. 2, I have prepared a calculation as to the number of customers shown on the map attached to the Citizens Gas Company line. We show as of September 9, 1932, 272 meters installed by Citizens Gas Company, of which number 28 were customers never served by Great Northern Utilities Company, leaving as of September 9, 1932, 244 meter installations representing meters taken from Great Northern Utilities Company by Citizens Gas Company. On September 9, 1932, Great Northern Utilities Company had installed 359 meters, all but six of which are shown on the map; the six not shown upon the map are at the power plant of the Great Northern Utilities Company and are not shown for that reason.

Cross-examination:

The 359 meters, less the 6 that are at the power plant approximately represent the number of separate customers that are attached to our system as of September 9th. In a few cases there are two meters set for the same person. In the case of a customer going good for another man's bill, one is set in his name and in four or five cases, the garage meter is set near the house. I would say that on September

9th, we had 353 separate consumers. Sheet 2 of Plaintiff's exhibit No. 2 fits together with sheet one to form a complete map and they come together on Fifth Avenue.

Referring to the two extensions that have been built by the Citizens Gas Company since July, 1930; these two exten- [fol. 113] sions serve three consumers to my knowledge, two of whom were formerly connected to our system. I have overlooked one extension on sheet two in my direct testimony. There is another extension of approximately 700 feet which may be described on the map as located on Ninth Street starting from the alley north on Main Street, thence north. In giving distances as to the length of the extensions testified to, I have only estimated the distances by using the scale of the map which is a scale of one inch to 100 feet.

Redirect examination:

On the Ninth Avenue extension of approximately 700 feet, there are two consumers who belong to the Citizens Gas Company, one of these consumers was formerly served by the Great Northern Utilities Company and one was not.

Whereupon plaintiff offered in evidence plaintiff's exhibit No. 2, consisting of two sheets, and in connection with the offer requested leave to substitute for the tracing marked as Exhibit No. 2, three blue prints, which was granted, and plaintiff's Exhibit No. 2 was received in evidence subject to the general objection to the introduction of testimony made by the defendants at the commencement of the taking of the testimony, which said Exhibit No. 2, is herewith next correctly reproduced as follows, to-wit:

(Here follows Plaintiff's Exhibit No. 2, side folios 114 and 115)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

[fol. 116] Testimony of E. R. Foster

Whereupon E. R. Foster was duly sworn and called as a witness on behalf of plaintiff and testified as follows:

Direct examination:

My name is E. R. Foster; I reside in Chicago, and I am connected with the Great Northern Utilities Company through the William A. Baehr organization. I am in charge of rates and valuations of all the property operated by the William A. Baehr organization, of which the Great Northern Utilities Company is one. I am the same E. R. Foster who testified in Federal Court in the Great Falls Gas case and I am the same E. R. Foster who testified on the second hearing before the Commission in this proceeding. I have prepared for this hearing a certain exhibit illustrative of the competitive situation and likewise the operating end since 1928, and prior to that time. These exhibits have been personally prepared by me upon data or information that comes from the books of the company, which books were in my hands for the purpose of preparing these exhibits and which books are here in this room at this time for examination.

The exhibit, which the reporter has marked Plaintiff's Exhibit No. 3, was prepared by me and my analysis of it and my conclusions are as follows:

This exhibit shows the revenues and expenses of the gas department of the Great Northern Utilities Company from the year 1923 by calendar years, including the year 1931, also the same for the first seven months of 1932. The top line shows operating revenues from the sale of gas; total revenue from the sale of gas. Next is shown the operating expenses exclusive of taxes and exclusive of depreciation. Next is shown the taxes paid by the company exclusive of Federal Income Tax; then is shown the total expenses excluding the depreciation; next is shown the net operating [fol. 117] revenue before depreciation has been deducted. The Federal Income Tax by years has been shown next; and after deducting Federal Income Tax year, the total amount available for return and depreciation has been indicated. Below this statement is shown the meters in use on January 1, 1923, and at the end of each of the periods

indicated. The thousands of cubic feet of gas purchased has been indicated for each period; also the amounts of gas sold; the thousands of cubic feet, the amounts used by the company, the amounts transferred to the electrical department, and the amounts unaccounted for. The unaccounted is also indicated in per cent. This exhibit shows that the gas sales and revenues, also the number of customers built up steadily from the time the property was first put into operation which was just shortly prior to 1923, shows a steady increase in all of these items until the year 1929—I should say the year 1928 when competition developed in the fall. Sales, gross revenue and net revenue show a drop in 1928 as compared with the year 1927 because of two rate reductions, and also because of loss of customers and sales due to competition developing late in the year, the year 1929, and thereafter shows a decided drop in sales, revenues and customers. During the year 1931, there was some increase in the number of meters in use, but regardless of that fact, the sales were lower than the year 1930, and also the revenues were lower than during the year 1930.

The red figures in the line noted as net operating revenues indicate that the company did not take in enough money from the sale of gas to pay for the cost of gas, and actual operating expenses, that is, expenses for labor and maintenance, etc. The exhibit, which the reporter has identified as Plaintiff's Exhibit No. 4, was prepared by me. This exhibit shows the various gas rates that have been in effect for the Great Northern Utilities Company since January 15, 1923, which was very shortly after gas was first turned on; these various rates are shown and also the date when the various rates became effective. The first three schedules [fol. 118] on the sheet were approved by the Public Service Commission, the last two were not. The last two represent schedules in effect since this rate competitive controversy commenced, and the last schedule, effective September 1, 1931, was put into effect following the issuance of the temporary injunction by the Federal court.

I have prepared a study showing the effects of the application of the 25-cent rate prescribed by the commission to actual operations of the company since the commencement of the competition. I also prepared the exhibit which the reporter has identified as Plaintiff's Exhibit No. 5, sheets

one and two. Page one of this exhibit is a study of the allowances for depreciation and return based on the commission's order No. 1530. On page 15 of the commission's order No. 1530, the Commission found the value of the property as of January 1, 1928, a total of $43,214.22. This figure represents the found value of the property of the gas department of the Great Northern Utilities Company at Shelby. To that value has been added the net additions during 1928, taken from the company's records, so that a total value in property has been found, based upon the commission's order at the first of the year, 1929, this amounted to $47,179.10. The value of property on this same basis has been indicated for each of the years 1930, 1931 and 1932. The additions to property during the years 1929, 1930 and 1931, also for the first seven months of 1932, have been indicated. These figures have been taken from the company's records based upon the valuation figures as indicated for each year, depreciation has been computed at the first of the year based upon the commission's order No. 1530. The commission allowances for the depreciation was 8 per cent on all except land at $1,300.00, which item of land was of the value of $1,300.00, and working capital of $2,500.00, which was the value assigned to that element by the commission.

Depreciation on the net additions during the year have been computed at 4 per cent; on some additions assuming [fol. 119] that they were added uniformly during the year. They are very small at any rate, so that not much money is involved. Then the total for depreciation has been indicated; the return upon the property has been computed at 8 per cent, which is in accordance with the Commission's order No. 1530. This computation has been carried out just as was explained for the item of depreciation; total sales of gas in M cubic feet for each of the periods has been indicated. Then the amounts per M cubic feet sold has been computed for each of the items of depreciation and return as explained above. Page No. 2 is a study showing the deficit for three years and seven months based upon the rate found and the allowance for depreciation and return as indicated in Commission Order No. 1530. In this study for each of the three calendar years and for the seven months period of 1932, the sales in M cubic feet have been

indicated; also the operating expenses in some detail have been indicated for each period in total dollars, and in dollars per M cubic feet sold. The "M" cubic feet means, of course, per thousand cubic feet of gas.

The operating expenses have been set up with the cost of gas shown separately. The allowance for depreciation and return based on Commission Order No. 1530 have been transferred from page 1 of Exhibit No. 5, and these allowances have been added to the total expenses for each period. Total required revenue then as computed is indicated for the year 1929 as .4299 dollars per M cubic feet; for the year 1930, .4205 dollars per M cubic feet; for the year 1931, .4824 dollars per M cubic feet, and for the seven months period ending July 31, 1932, .4367 dollars per M cubic feet. That is the revenue which would be required to discharge the expenses and depreciation and return as given in this exhibit, in accordance with the commission's rulings.

Next has been set down the total revenue which could be expected for each of the periods based upon the rate set up in Commission's order No. 1530. The commission found that the rate which they specified would produce an average [fol. 120] of 27 cents per M cubic feet sold. This figure has been used for each of the periods and the total revenue has been computed by using that average price applied to the actual cubic feet sold by the company at each period. At the bottom of the exhibit is shown the deficit which resulted and which amounts to .1599 dollars per M cubic feet for the year 1929; .1505 dollars for the year 1930; .2124 dollars per M cubic feet for the year 1931; and .1663 dollars per M cubic feet for the seven months of 1930. It should be pointed out that on page 1 of this exhibit for the seven months period of 1932, depreciation allowances, and allowances for return, is on a basis of seven months, not on an annual basis, which is to make it correspond with the actual periods shown.

"Q. What conclusion do you draw from that exhibit? (referring to Plaintiff's Exhibit No. 5).

"Mr. Silver: At this time we object to the witness drawing any conclusion from this exhibit on the grounds and for the reasons that the complaint in this case does not raise any issue as to the reasonableness and justness or confiscatory character of the rate prescribed by the Commission, in

Report and Order No. 1530, Plaintiff's Exhibit No. 1 introduced herein on the ground that the question of confiscation has not been raised by the complaint excepting as to the right of the plaintiff in this case to charge a rate, or schedule of rates lower than the rates or schedule of rates fixed by the Commission in its Report and Order No. 1530, Plaintiff's Exhibit No. 1.

"Mr. Gunn: We desire to state that while Circuit Judge Sawtelle in his opinion found that the complaint does present the question of confiscation, that we intend at the hearing of this cause to present an amendment to the Bill of Complaint specifically charging confiscation."

This exhibit indicates that if the rates prescribed by the Commission had actually been charged during these periods, the company could not have earned enough to pay operating expenses, including the depreciation and have left a net amount which would produce a fair return based upon the valuation found by the Commission.

The operating expenses would include cost of gas, depreciation, and all other expenses. Referring to the first column of sheet two of plaintiff's Exhibit No. 5 for the year 1929, we have expenses, a total of $17,425.96; then under the total we have cost of gas $6,750.82. That figure is in [fol. 121] addition to the total. The total expenses include the cost of gas; the proportion of the expense has been segregated above so that the cost of gas sold could be clearly shown here and it is a part of operating expenses.

"Q. Then your total expenses, including cost of gas for the year 1929, for example, are what in dollars?

"Mr. Silver: Now, we make the same objection to this question that we made to the former question and we want it understood that it goes to all questions relating to what the expenses of the Utilities Company would have been under the Commission's prescribed rate. Is that agreeable?

"Mr. Toomey: That is agreeable. I simply want to classify them for the purpose of the record."

Whereupon the witness, in answer to questions propounded to him by plaintiff's counsel gave the following further testimony, subject to the objection above noted.

Taking the year 1929, for example, our total expenses for that year, including cost of gas purchased, was $24,176.78. Our total revenues for that year, applying the commission rate, would be $19,753.34, so that we would fall in dollars $11,669.64 short of meeting the requirements fixed by the commission, that is, after allowances for depreciation and return have been added to the expenses.

That is based on the quantity actually sold.

I prepared the exhibit which the reporter has identified as Plaintiff's Exhibit No. 6. This study is for simplicity; there has been set up in cents per M cubic feet in Plaintiff's exhibit No. 5, the actual operating expenses of the company, excluding cost of gas that had been used for each of the years in question.

"Mr. Silver: Pardon the interruption. I see from the Exhibit that this relates to rates for returns earned under the rate prescribed by the Commission. I desire to renew the same objection made to the testimony of the witness in this respect and may the understanding be that all questions with reference to Exhibit No. 6 go in subject to that objection.

"Mr. Toomey: So agreed."

Whereupon the witness, in answer to questions propounded to him by plaintiff's counsel gave further testimony with reference to plaintiff's Exhibit No. 6, subject to the objection of the defendants immediately above noted. [fol. 122] The actual operating expenses of the company per M cubic feet as shown in Exhibit No. 5 are materially higher than the estimated expenses which the Commission included in its Order No. 1530. On page 25 of that order the Commission states that the company should be able to operate so that all of its expenses excluding cost of gas should be approximately .1354 dollars per M cubic feet sold. In Exhibit No. 6, operating expenses excluding cost of gas and depreciation have been set up at the figure specified by the commission; to that figure has been added the actual cost of gas per M cubic feet sold as taken from the company record. The depreciation allowance and the allowance for return upon the property have been transferred from Exhibit No. 5, and each of these for each of the periods shown are based upon the Commission's valuations

as indicated in Order No. 1530 for the years 1929 to 1931 inclusive, and the seven months period of 1932. Total requirements for all expenses including cost of gas plus fair allowance for depreciation and fair rate on return, have been computed. Comparing these requirements for each period with the average revenue which the Commission said would result from their rate schedule as ordered, we find that there is a deficit for the year 1929 of .0571 per M cubic feet; for the year 1930 a deficit of .0549 dollars per M cubic feet; for the year 1931 a deficit of .0960 dollars per M cubic feet, and for the seven months period ending July 31, 1932, a deficit of .0723 dollars per M cubic feet sold.

For the seven months ended July 31 1932, the application of the commission's rate to actual gas sales for the same period show that these rates are running about 7¼ cents per M cubic feet under that which would be necessary to wipe out the deficit.

I might add that this study was prepared to show what might result if all the estimates made by the Commission were applied with the exception of cost of gas, a point which is an actual fact; there may be some question about operating expenses at any time and consequently I have set [fol. 123] up the estimated expenses as indicated in the Commission's order. The only thing that is different from those estimates in the Commission's order is the cost of gas, is the amount actually paid per M cubic feet during these periods.

In compiling plaintiff's Exhibits Nos. 5 and 6, I followed in general the same methods the Commission followed in its Report and Order No. 1530 in building the rate. With reference to sheet 2 of Exhibit No. 5, these revenues resulting from the application of the Commission's rate are and being $17,753.34 for the year 1929; $18,191.25 for the year 1930; $15,090.03 for the year 1931; and $10,681.07 for the seven months ending July 31, 1932, may be compared against the total expense figures exclusive of cost of gas for the same year and shows just a slight coverage of the expenses plus taxes, with nothing for cost of gas, and nothing for depreciation, and nothing for fair return.

Whereupon plaintiff in connection with examination and testimony of witness Foster offered in evidence plaintiff's exhibits Nos. 3 to 6, inclusive.

Whereupon the defendants made the following objection:

"Mr. Silver: Except the general objection interposed at the commencement of this case, there is no specific objection to either exhibits Nos. 3 nor to No. 4. Now as to Exhibits numbered 5 and 6, and to each of them, the defendant interposes the objection that the evidence is not germane to any issue raised by the pleadings; that the complaint does not complain that the rates prescribed by the Commission are or were confiscatory; complaint merely contending that the plaintiff has the right to charge any rate or set of rates under the schedule of rates prescribed by the Commission."

Whereupon, and subject to defendants' objection as above noted, plaintiff's exhibits Nos. 3 to 6, inclusive, were received in evidence by the Examiner and are in words and figures as follows, to-wit:

(Here follows Plaintiff's Exhibit No. 3, side folio 124)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

[fol. 125] PLAINTIFF'S EXHIBIT NO. 4

Great Northern Utilities Company, Shelby, Montana
Natural Gas Rates

	Net
Effective Jan. 15, 1923	$1.00 per M. c. f.
First 5,000 cu. ft.	.80
Next 10,000 " "	.60
Next 20,000 " "	.45
Next 35,000 " "	.35
Next 80,000 " "	.30
Over 150,000 " "	
Min. Bill, $1.50.	

Effective Jan. 1, 1924	Net
First 5,000 cu. ft.	.60 per M. c. f.
Next 5,000 " "	.55
Next 10,000 " "	.45
Next 30,000 " "	.40
Next 250,000 " "	.35
Over 300,000 " "	.30
Min. Bill $1.50.	

Effective Nov. 25, 1927	Net
First 10,000 cu. ft.	.50 per M. c. f.
Next 10,000 " "	.45
Next 30,000 " "	.40
Next 250,000 " "	.35
Over 300,000 " "	.30

Effective Nov. 1, 1928	Net
First 300,000 cu. ft.	.20 per M. c. f.
Over 300,000 " "	.15
Min. Bill $1.50.	

Effective Sept. 1, 1931	Net
All Gas Used	.15 per M. c. f.
Min. Bill $1.50.	

[fol. 126]

PLAINTIFF'S EXHIBIT NO. 5
Sheet 1

Great Northern Utilities Company, Gas Department Only

Study of Allowances for Depreciation and Return Based on Montana Commission Order #1530

		1929	1930	1931	1932 to July 31st
Value of property as of 1-1-28 p. 15, Commission order #1530	$43,214.22				
Net Additions during year 1928 from company records	3,964.88				
Total at first of year		$47,179.10	$47,573.33	$48,618.55	$48,790.73
Net additions during year		394.34	845.11	172.18	r534.60
Depreciation on Value at 1st of year as allowed in Commission Order #1530. (8% on all except Land at $1,300, plus Working Capital at $2,500)		$3,470.33	$3,501.88	$3,585.16	*$2,093.74
4% on net additions during year		15.77	33.80	6.89	r1.25
Total for depreciation		3,486.10	3,535.68	3,592.05	2,092.49
Return on Value at 1st of year as allowed in Commission Order #1530 (8%)		$3,774.33	$3,805.88	$3,889.48	*$2,276.90
4% on net additions during year		15.77	33.80	6.89	r1.25
Total for return		3,790.10	3,839.68	3,896.37	2,275.65
Total Sales, M. Cu. Ft		73,160.5	67,375.0	55,889.0	39,559.5
Depreciation per. M Cu. Ft		.0518	.0570	.0697	.0575

*—Based on 7 months.
r—red.

[fol. 127] Exhibit No. 5, Sheet 2

Great Northern Utilities Company, Gas Department Only

Study Showing Deficit for Three Years and Seven Months Based on Rate Found and Allowances for Depreciation and Return in Commission Order #1530, Together with Actual Operating Expenses from Company Records

	1929		1930		1931		1932 to July 31	
	Total	Per M.c.f.	Total	Per M.c.f.	Total	Per M.c.f.	Total	Per M.c.f.
M. Cu. Ft. sold	73,160.5		67,375.0		55,889.0		39,559.5	
Expenses:								
Transmission and Distribution	$2,339.76	$.0320	$2,342.97	$.0348	$1,843.97	$.0330	$714.05	$.0181
Commercial	3,229.60	.0442	2,679.47	.0398	1,846.97	.0331	912.71	.0231
General	8,987.64	.1228	8,287.37	.1230	8,071.19	.1444	5,385.04	.1361
Undistributed	1,166.42	.0159	1,247.85	.0185	1,307.75	.0234	1,456.71	.0368
Taxes	1,702.54	.0233	1,007.14	.0149	1,002.18	.0179	606.25	.0153
Total	17,425.96	.2382	15,564.80	.2310	14,072.06	.2518	9,074.76	.2294
Cost of gas	6,750.82	.0923	5,388.99	.0800	5,399.28	.0966	3,816.80	.0965
Total expenses	24,176.78	.3305	20,953.79	.3110	19,471.34	.3484	12,891.56	.3259
Depreciation based on allowance by Montana Commission in Order #1530	3,486.10	.0476	3,535.68	.0525	3,592.05	.0643	2,092.49	.0529
Fair return based on Montana Commission Order #1530	3,790.10	.0518	3,839.68	.0570	3,896.37	.0697	2,275.65	.0575
Total Required Revenue	31,452.98	.4299	28,329.15	.4205	26,959.76	.4824	17,259.70	.4363
Estimate Revenue based on rate p. 26 of Commission Order #1530 (Av. Price $27 per M. c. f.)	19,753.34	.2700	18,191.25	.2700	15,090.03	.2700	10,681.07	.2700
Deficit	11,699.64	.1599	10,137.90	.1505	11,869.74	.2124	6,578.63	.1663

[fol. 128] PLAINTIFF'S EXHIBIT No. 6

Great Northern Utilities Company, Gas Department Only
Study Showing Application of Montana Commission Report and Order #1530 to Actual Sales of Gas for Past Three Years

	Per M. cu. ft.			
	1929	1930	1931	1932 to July 31
Operating expenses exclusive of cost of gas purchased and depreciation allowance (p. 25 of Order #1530)	$.1354	$.1354	$.1354	$.1354
Actual cost of gas from company records.	.0923	.0800	.0966	.0965
Depreciation allowance at 8%, based on Commission Order (p. 25 of Order #1530)	.0476	.0525	.0643	.0529
Rate of return at 8% based on Commission Order (p. 26 of Order #1530)	.0518	.0570	.0697	.0575
Total requirement	.3271	.3249	.3660	.3423
Average revenue which will result from application of rate schedule ordered by Commission (p. 26 of Order #1530)	.2700	.2700	.2700	.2700
Deficit	.0571	.0549	.0960	.0723

[fol. 129] Cross-examination:

Referring to Exhibit No. 3 and the fact noted thereon that the amount of gas transferred to the Electrical Department has been increased from year to year, this may be accounted for by increase in generation at the Great Northern Utilities Company Electric Department generating electricity here in Shelby supplying the town of Shelby with electricity, serving the towns up through the oil fields to the north; also Coutts in the Province of Ontario (sic); serving Cut Bank and serving the small towns as far as Glacier Park; that would include Blackfoot and Browning. The oil towns that I referred to are Oilmont, Kevin, Sunburst, Sweet Grass, and the scattered customers through the field. The revenue that comes to the Gas Department for this gas that is transferred from the Gas Department to the Electrical Department, is not included in Operating Revenues shown on Exhibit No. 3.

The Electrical Department settles with the Gas Department for the gas transferred on this basis—the gas transferred is paid for at the gate rate prescribed. In other words, that is a transfer. We pay so much at the city gate for our gas and the price that we pay for the gas at the city connection is the price at which the Electrical Depart-

ment settles with the Gas Department. The Electrical Department takes delivery of its gas at the electric plant which, I judge, is about a half mile from the gateway. The Electrical Department is served by a separate pipe line which takes off of the regular distribution system of the Great Northern Utilities Gas Department.

The rate shown on Exhibit No. 4, effective September 1, 1931, is a straight rate of 15 cents per M cubic feet. This rate was put into effect after the interlocutory injunction in this proceeding was granted and was without any reference to the commission's approval or disapproval. We did not even file such a rate with the commission.

In Exhibit No. 6, I show the average revenue which will result from application of rate schedule ordered by com- [fol. 130] mission in Report and Order No. 1530 of 27 cents per M cubic feet. That was the estimated figure used by the Commission. I have not in this exhibit nor any of my exhibits applied the schedule of rates prescribed by the Commission to the actual consumption as shown by the consumers' ledgers, to determine what would have been the actual experience of the utility had it applied the Commission rate. That would be a big job. It was done at the time the 27 cent rate was estimated. Mr. Buck made that rate, consequently, I know that is what it came from. That applied to our consumption prior to the estimate, in 1928 and along in there.

The Operating Expenses shown on the same exhibit as estimated by the Commission at $.1354 per M cubic feet is an average of the operating expenses of our utility—gas department—over the period of years of its existence. The Operating Expenses for a thousand cubic feet of gas sold naturally varies with consumption. Generally, it is true that as you increase your consumption it makes the cost smaller per M cubic feet; and the larger percentage sold would tend to make a lower figure for the M cubic feet cost.

Redirect examination:

The practice of furnishing gas by the Gas Department to the Electrical Department of the utility was in force and followed when Report and Order No. 1530 was issued by the Commission. I believe that practice has been in effect since the Electric Department has been furnished

with gas. There has been no deviation from that and I think that none has been required by the Commission to the contrary.

The investment devoted to that service is very small and at the present time with a flat gate rate, the only effect which this transfer could have would be that none of the unaccounted for gas has been allocated against the Electrical Department.

The Electrical Department is not treated as a customer. If a portion of the unaccounted for gas was charged against [fol. 131] the Electrical Department, then it would be treated as a customer. We have not done that. I do not know exactly how the physical connection is made for the Electrical Department of my own knowledge.

In adopting the revenue and expense figures which I had in the preparation of Exhibits Nos. 5 and 6, I have in Exhibit No. 6 used the same figure employed by the Commission in Report and Order No. 1530 per M cubic feet, expenses per M cubic feet of gas sold, but in Exhibit No. 5 I have used the actual expenses from the company's records. So far as the ultimate effect is concerned, the result is a deficit in either case.

The reduction made by the company in September, 1931, to a 15-cent flat rate was made for the purpose of holding customers that the company had at that time and also it was made for the purpose of probably increasing the number of meters on the lines by offering at a cheaper price. The result so far as getting customers was concerned is that the meters attached at that time and at the present time indicate that there has not been much change. As a matter of fact there has been a slight loss for at the end of 1931, when there were 371 meters in use and in July 31, 1932, when there were 363, there was very small change there. The reduction has not been effective as far as bringing or attracting customers is concerned. Competition is still tight and keen.

Referring to the use of gas by the Electrical Department from the Gas Department, reference to which was made this morning, it is about 200 feet from the end of the distribution system to the electric plant. There is a pipe in there which is devoted exclusively to serving the electric plant. Assuming that no part of the present distribution system would be used to carry gas to the electric plant from

the city gate, it would take approximately 3,200 of pipe to cover the distance from the city gate to the electric plant, that is, to give them the sole and exclusive pipe line to the electric plant. If there was a separate line, it could be two inch. If there is sufficient pressure at the city gate to serve [fol. 132] the electric plant through a two-inch line, it would cost about 58 cents per lineal foot laid, making a total cost of approximately $1,800.00.

Gas is purchased from the Ohio Oil Company at the city gate; they deliver it in their own pipe to the city gate. They are not a public utility.

With reference to Exhibits Nos. 5 and 6, some question was raised respecting a customers' analysis. Report and Order No. 1539 of the Commission contained a customers' analysis prepared by Mr. Buck, the chief engineer of the Commission. The report had the summarization of the analysis. His analysis was for gas used for the year ended September 21, 1928, which was just before competition started, or about that time. His analysis, I would say, took no account whatever of the competitive situation but was made on the eve of that situation at a time when competition was imminent and actually coming into being at the time. Before the first of the succeeding year, the company had lost over 100 meters.

The Commission in Report and Order No. 1530, figured from the company's operations that our expenses were about 13.54 cents per M cubic feet, excluding cost of gas. That figure was taken from the history of the company's operations. We would have to get from the rate that 13.54 cents and then in addition, we would have to get something for cost of gas, depreciation, and a fair return.

Based on customers' analysis, the Commission concluded that we would have to get about 27 cents to take care of our expense of 13.54 cents, depreciation, a fair return, and cost of gas. In other words, the Commission figured that on an average through the whole body of customers, each thousand cubic feet of gas would have to yield 27 cents in order to pay the operating expenses, depreciation as figured by the Commission, and a fair return. From that figure, it was figured that a 35-cent rate would achieve that result, a 35-cent top rate on the basis of 120,000,000 cubic feet consumption annually, which was approximately the whole

[fol. 133] quantity sold in that community, exclusive of the electric plant in 1927.

As a result of the experience since competition commenced, and based upon my knowledge of the situation, I do not believe there would be a wide divergence from the average found if a customers' analysis at the present time were to be made. Customers' characteristics would be about the same today as they were at that time, that is, customers in this town use gas for heating and cooking and water heating and the same thing would be true now as it was at that time. The spread between the expense figures found by the Commission of 13.54 cents per M cubic feet exclusive of cost of gas and our figure, based on actual operation, is about 10 cents per M cubic feet. The actual expense, exclusive of cost of gas, has been in cents .2382 in 1929; .2310 in 1930; .2518 in 1931; and for the first seven months of 1932, .2294 cents. The figures just given are exclusive of cost of gas. The difference is widened when you take into account the cost of the gas sold, for the reason that the commission estimated cost of gas at 7 cents per M cubic feet less 10% unaccounted for gas which would make the cost of gas 7.77 cents per M cubic feet. As a matter of fact, the cost of gas has ranged from 8 cents per M cubic feet to about 9.66 cents per M cubic feet sold. The spread between the Commission's finding as to expense per M cubic feet and the actual results of our experience is so great that in my judgment it would not be affected at all by any change in the 27-cent figure. I think that can be indicated best by plaintiff's Exhibit No. 5, page 2, where the requirements during the four periods indicated, varies from 42.05 cents per M cubic feet sold to 48.24 cents per M cubic feet sold; that is the revenue requirement and the requirement of each of the periods is much greater than the top step of the rate set by the Commission, the top step being 35 cents per M cubic feet. Based on my Exhibit No. 5, we would have to get approximately on the average of 45 cents per M cubic feet as against the Commission's allowance of 27 cents average.

[fol. 134] Recross-examination:

This figure, 13.54 cents, being an average cost per M cubic feet of gas sold, found by the Commission upon the history of the company, excludes the cost of gas purchased.

It also excludes any charge of operating expenses for depreciation. At the time of the hearing before the Commission, the contract in existence between our company and the Ohio Oil Company for gas delivered at the city gate was for gas delivered at the following rate: first 5,000,000 cubic feet per month at 15 cents per M cubic feet net, all excess at 10 cents per M cubic feet net. We never had a supplementary contract for the 7 cent price. Your recollection is correct that at the time of the hearing which was held on our Schedule No. 4-A which called for a 20-cent base rate, the statement was made by our Manager, Mr. Sikes, that there was an agreement with the Ohio Oil Company under which the Great Northern Utilities Company was to purchase gas at the city gate at 7 cents per M cubic feet. There is no formal contract, there is an understanding that that is the price, and that is the rate that has been charged by the Ohio Oil Company to the Great Northern Utilities Company since the latter part of 1928. Other than unaccounted for gas, there is no other factor that enters into the cost of gas purchased that would increase that cost above 7 cents per M cubic feet.

Stipulation as to Evidence

Plaintiff and defendants, through their counsel, agreed in open court before the Examiner, that the Federal census in 1930 shows a population for the town of Shelby of 2,004.

Testimony of Walter Tillman

Whereupon Walter Tillman was duly sworn as a witness and testified on behalf of the plaintiff as follows:

Direct examination:

My name is Walter Tillman; I reside at Shelby, and I [fol. 135] am connected with the Citizens Gas Company as manager at Shelby, a position that I have occupied continuously since October, 1928. I am also secretary-treasurer of the corporation and as such have its books and records in my possession. The corporation is capitalized for

I think $100,000 divided into 50,000 shares of common and 50,000 shares of preferred. Approximately 8,300 share- of common have been issued and none of the preferred. The par value of the common stock is supposed to be a dollar. Of the 8,300 shares of common stock issued, none of it is held by residents of Shelby. There is some of it out in Calgary in Canada; some of it in Missouri, and some in Minnesota. None of the preferred stock is issued until it is paid for. It has been subscribed for. Out of a total of 50,000 authorized, 43,000 of the preferred has been subscribed for and about 80% of that 43,000 is held by citizens of Shelby. When their subscriptions to the preferred stock are paid for, the citizens have certain rights to the common stock, the arrangements being that approximately 42,000 shares of common stock will be divided equally among the 43,000 of the preferred stock subscribed, so that in any event 80 per cent of the common stock will also find its way into the hands of the citizens of Shelby, by citizens I mean those who are living here and are residents here.

The officers of the company are J. W. Williamson, President, Ray Larson, Vice President, and Walter Tillman, Secretary-Treasurer. They are all residents of Shelby. The directors are the three above named, together with Harry Seister and Tom Costello. Costello is no longer a resident of Shelby. He was a hotel man here and moved to Spokane. He was a resident of Shelby while he was a director and before he left here and he is still a director. He was a resid*id*ent of Shelby when he was elected.

J. W. Williamson, President of the company, is mayor of the municipal corporation of Shelby; I don't know exactly but I think he has been mayor for four years. Neither Ray [fol. 136] Larson nor any of the other directors are connected with the municipal corporation.

Williamson is connected with the School Board, a consolidated board of some kind covering both High School and Public School. He has been on that Board, I think about—over two years. The Citizens Gas Company sells gas to the City of Shelby, to the High School, and to the public school. All but about two of our stockholders or subscribers are customers. Their average subscriptions are $100.00, that is $100.00 subscribers.

The Citizens Gas Company is charging now 20 cents per M cubic feet with a penalty of 3 cents per M cubic feet if

not paid by the 10th of the month. Commencing with the company's event in October, 1928, the rate the company then charged was a sliding rate from 35 cents down to 12½ cents per M cubic feet. That remained in effect until January, 1930, when that rate was reduced to the 20 cent rate, this base rate. No change has been made since that date. This reduction has been submitted to the Commission but was never approved. The 35-cent rate was approved, that is, the first initial rate down to 12½ cents was approved by the Commission, but the 20-cent rate never was.

The Commission has not made any investigation of our rates that I know of or conducted any hearing at Shelby or elsewhere on our rates, or as to the value of our property or operation.

Cross-examination:

When I referred to our present rates, I referred to this schedule which has been shown and marked as having been received by the Railroad Commission on March 13, 1930. My attention is directed to the fact that this is a 23-cent per M rate subject to a 3-cent per M discount. That is right. My testimony will stand corrected that it is not a 20-cent rate plus a penalty. It is a 23-cent rate.

Redirect examination:

We are charging 20 cents here in town with the penalty [fol. 137] added to the bill if not paid on the 10th of the month. For instance, if the consumer uses 20,000 cubic feet of gas, there is attached on his statement a penalty of 60 cents if not paid by the 10th of the month, but the consumer -an acquit his obligation to the company by paying 20 cents flat. I do not have any bills with me or sample bill forms or printed forms. The company was not originally organized by residents of Shelby; it was agitated by residents of Shelby but it was not organized by them. When it was first organized, it was organized by Mr. Lilly with Minneapolis capital. Mr. Lilly was a resident of Shelby at that time. The company was purchased by citizens of Shelby from Lilly and his associates under an arrangement whereby citizens were to pay so much money down and the rest over a period of so many years; this money is payable to S. H. Bowman, Trustee, of Minneapolis. That was the obligation of the Citizens Gas Com-

pany to Bowman, the obligation of the corporation. None of the citizens of Shelby are sureties or guarantors on the corporation's obligation to Bowman.

Recross-examination:

When the company was formed in the fall of 1928, it was financed by Minneapolis money. The local interests undertook to purchase from the Minneapolis interests their interest in the Citizens Gas Company in April 1931. Up until that time, the Citizens Gas Company was owned by Minneapolis interests. There are 43 subscribers to the capital stock, either preferred or common of the Citizens Gas Company among the citizens of Shelby and of those 43, all but two are consumers. The company does have outstanding mortgage bonds that were executed to S. H. Bowman, as trustee, to secure the purchase price.

Redirect examination:

The subscriptions to the preferred stock were made in April 1931, and the subscriptions to the preferred carried rights to the common with them.

[fol. 138] Whereupon plaintiff rested and thereupon the defendants made the following motion:

"Mr. Silver: Comes now the defendants, and each of them, and moves that all of the testimony of the witness Foster relative to the application of the commission's prescribed rate in its Report and Order No. 1530, and the estimated earnings thereof, and all evidence concerning exhibits numbered 5 and 6, and each of the said exhibits be stricken from the record on the grounds and for the reasons that the same do not tend to support any issues tendered by the complaint herein, are wholly irrelevant and immaterial. On the further ground that the question of the confiscatory character of the rates prescribed by the Commission in its Report and Order No. 1530 are nowhere put in issue by the complaint herein."

Defendants' Case

Stipulation as to Evidence

It was stipulated between plaintiff and defendants, acting by and through their counsel, that the complaint filed

with the Public Service Commission by the said Citizens Gas Company, protesting schedule 4-A submitted by Great Northern Utilities Company, referred to in paragraph XIX of the complaint herein, was, without any public hearing having been held thereon, dismissed by the Public Service Commission of Montana.

It was further stipulated that the franchise ordinance and the franchise granted by the ordinance numbered 82 attached to the Bill of Complaint as Exhibit "A", running to Forrest P. Williams, his associates and assigns, was granted by the City of Shelby after due compliance with the provisions of Sections 5074 and 5077, Revised Codes of Montana, 1931, pertaining to the granting of franchises by incorporated cities and towns, and that it is a valid ordinance.

It was also stipulated that the franchise of the Citizens Gas Company, originally granted under Ordinance No. 108 to the Shelby Oil and Gas Company, its associates and assigns, was granted by the City of Shelby, after due compliance with the provisions of Sections 5074 to 5077, Re-[fol. 139] vised Codes of Montana, 1921, said ordinance being pleaded as Exhibit B to the Bill of Complaint.

It was further stipulated that the State of Montana, either acting as the state or through any of its political sub-divisions, has not attempted to subject the Great Northern Utilities Company to the penalty prescribed by section 3908 and section 3888 of the Revised Codes of Montana, 1921.

Whereupon WALTER TILLMAN was recalled on behalf of defendants and testified as follows:

Direct examination:

I am the same Mr. Tillman who testified on behalf of plaintiff here just a few moments ago. I will state for the record the amount of gas sold by the Citizens Gas Company to each of its consumers for the years 1928, 1929, 1930 and 1931, as follows: for the three months of the year 1928, 12,884,980 feet; as of December 31, 1928, we had 187 customers. In 1929, we sold 76,745,800 feet, and had as of December 31, 1929, 213 customers. In the year 1930,

we sold 76,649,000 feet to 251 customers. In the year 1931, we sold 76,749,000 feet to 244 customers. For the seven months of 1932, there was sold 67,599,000 cubic feet to 269 customers.

We have 269 customers at the present time, all residing in Shelby.

Our cost of operations per thousand cubic feet of gas sold for the various years above referred to, excluding the cost of gas purchased and the expenses of depreciation are as follows: For the year 1929, our total expenses, less cost of gas purchased and depreciation, was $12,471.15, making the cost per M cubic feet .165 dollars. For the year 1930, total expenses were, less cost of gas and depreciation, $8,854.59, making cost per M cubic feet of .106 dollars. For the year 1931, total expenses, less cost of gas and depreciation, were $9,509.06 making a cost per M cubic feet of .123 dollars. For seven months in 1932, our total expenses, less cost of gas and depreciation, were $5,536.76 making a cost per M cubic feet of .092 dollars.

[fol. 140] Our cost of gas purchased for those years was 3 cents per thousand cubic feet. This is the delivered price at the mouth of the well, and all of the expenses from the mouth of the well into the City of Shelby, and all expenses incurred in the distribution of that gas, are included in the figures I have given as cost of operations other than cost of gas purchased and depreciation.

Cross-examination:

For the year 1929, I said our total expense, less depreciation, in dollars was $12,471.15. The details of that $12,471.15 include distribution $980.24, which covers the expenses apportioned to the distributing system, repairs and maintenance within the town. The expense of the line to the field was $628.72; included in that is car hire, changing meters or changing charts of the meters, and looking after trips to the wells. This $628.72 is a part of the $12,471.15. The basis of apportionment between the town and field lines is that there is a charge of 10 cents per mile for the car, so much time for the man going out—in the winter time it takes three or four hours, in the summer time, maybe half an hour. Both of the above-mentioned sums, $980.24

and $628.72 are under the item of distribution and that is all under that item.

My next figures going into this total $12,471.15 is general operating expense or $5,637.99; that item consists of officers' salaries $4,089.30, which amount is payable to myself as manager, the remainder of that figure of $5,637.99 covers office supplies and expenses. The item $202.46 covers printing, pencils, stamps and stuff like that.

Under the item of general operating expenses is law expense amounting to $1,063.74; our lawyer gets that. Miscellaneous general expenses go in that, it amounts to $282.49; that covers donations, advertising and things like that, making a total of $5,637.99, for general operating expenses.

My next item of this $12,471.15 is collection expense of [fol. 141] $129.30. That expense is incurred in collecting bills. It does not cover reading meters. There is no labor expense in that, it merely covers the man's time in making collections.

Another item is commercial expenses, $499.42. I will bring the girl down with the books to inform you who gets that and what it is for; that does not include the salary of the bookkeeper.

Another item in that $12,471.15 is maintenance of meters, $36.57. Maintenance of distribution system, buildings, fixtures and grounds, $1.30. Operation water distribution system, labor $552.65 covers labor on the distribution system, repairs, and checking upon walking over the lines looking for leaks. Customers' premiums expense, $4,365. Distribution supplies and expenses, $71.50; maintenance of mains, $78.61; maintenance of services, $195.80; interest on funded debts, $2,274.96. The funded debt was $30,000 at 7 per cent—7 per cent on 30,000 dollars—and there is interest on floating debt $56.78—I do not know just how much the floating debt is. It was at the rate of 8 per cent.

Another item going into the figure $12,471.15 is miscellaneous deductions of $1,329.00. That sum is for amortization of franchise; amortization and organization and franchise. Those items were set up on the basis of a monthly charge of 1/456th of $50,500, representing the time before expiration of franchise from date of receipt.

We have set up a property element in our valuation of $50,500, covering organization of franchise, franchise $500,

organization $50,000. To that we add our investment for plant and equipment which is about $46,000. The above does not give all the elements of this $12,471.15. Taxes are $1,180.48, that is state and county; there were no Federal Income taxes for the year 1929, nor in 1930, nor in 1931. We have not paid Federal Income taxes because the figures are showing in red. figures did not show in red for all those [fol. 142] years; in 1929 it shows a profit of $1,419.82; in 1930, a profit of $1,8475; in 1931, a deficit of $1,064.71.

I think I have given the total of our expenses making up the expense item of $12,471.15 in 1929.

The profits I referred to, are after the interest charges that I have detailed, and after depreciation is taken out and the cost of gas. We had for depreciation $5,426.50 and we had taxes of $1,180.48, cost of gas $2,292.84, total for the year 1929, expenses, depreciation, taxes and cost of gas, $11,-103.25. The figure given of $12,471.15 was operating expenses, less depreciation and cost of gas at the well. Depreciation is $5,426.50, cost of gas $2,292.84, making a total of $20,190.49 for 1929. Our revenue for that same year was $21,675.24.

We have a bookkeeper which we pay $125. per omnth. We did have a bookkeeper in 1929 which we had at that rate; this is not found in the books, it comes out of my salary, out of the $4,089.30 above mentioned. We do not have any office rent. The office is maintained in my own building, The Tillman Plumbing Shop. We do not have any real estate taxes. There is a few dollars on the building on the north side amounting to about $5.00 per year.

We did pay in 1929 taxes of $1,180.48, including county and city. I do not have any idea without looking it up what the city taxes are separately.

We were charging the 35-cent rate in 1929. Had we been charging the 20-cent rate, we would have come out in the red.

Taking this last full year, 1931, this total of $25,190.49, does not include any interest, that is—interest on funded debt. In the figures given for 1929, interest on funded debt is included in the expense total of $12,471.15. Taking 1931, our total operating expenses for that year were $14,201.72, that includes depreciation and cost of gas. Depreciation in the amount of $5,465.76, and gas purchased in the sum of

[fol. 143] $3,270.47. We figured depreciation at the rate of 12½ percent a year which figures $14,201.72, including taxes. Our revenue in 1931 was $15,910.39. When I say we figured 12½% a year depreciation, I meant we figured 12½ per cent flat on the whole investment. By that I mean 12½ per cent of physical property—tangible property—the actual cost of plant. We took 12½ per cent of the sum of $46,000 which represents the tangible property.

The build-up of the operating expenses for 1931, namely $14,201.72 includes production $3,270.47, gas purchased $2,302.47; miscellaneous purchases, gas supplies and expenses, $968.00; distribution, $104.94, which includes maintenance of meters, maintenance of distribution, buildings, fixtures and grounds, consisting of labor. General Expense, $4,856.45 made up of general office salaries of $3,700.00, $3,600 of which went to myself and $100. for other stuff for the year.

General expenses also includes general office supplies of $113.10, law expense $479.76, general miscellaneous $49.53 and insurance $491.51. This insurance is for property damage, public liability and compensation.

Maintenance of utility equipment, $22.75, is also included in general expense.

We had a bookkeeper last year which we paid $125. per month; that cost comes out of my salary; I have to pay her. She keeps my own books and also the gas company's books for that money. That is, she is keeping the books of the plumbing shop also. The gas company does not pay her anything as its bookkeeper, that is included in my salary. I am paid $300 a month for management. In 1931, I did not have any labor. I charged the gas company for the labor I performed, that is, the plumbing charge that comes under improvements on the distribution system. The amounts I do not know offhand, it probably amounts to maybe $2,000.00. It is listed under extensions and was paid out of revenues.

For the year 1931, the extent of the improvements was [fol. 144] $147.72 on mains, $493.45 on services—that was not charged to operating expenses, it was an addition to mains and services. I have to do all of the maintenance out of my salary. I did hire help but the help were paid by the Walter Tillman Plumbing Shop out of my salary of $3,600.

Out of my salary of $3,600 as manager, I pay for the maintenance and bookkeeper, any additions I am paid for. I have to take care of capital expenditures or accretions. Outside of the salary paid me by the company as manager and secretary-treasurer, I receive nothing from the company. I own about one eighth or one ninth interest in the company, represented by a preferred stock subscription for 5,000 shares; no, I think it is $10.00 a share for the preferred stock and 500 shares.

The figure which I have given of $21,675.24, as the revenues for 1929, represents the charges and not the actual collections. I do not have with me the amount of actual collections but approximately my best judgment would be $1,000 for bad accounts.

In 1931, the total operating revenue was $15,918.39, representing charges and not collections. My recollection is that of that sum about $700 was left for collection.

We did not have any collection expense in 1931; they came out of my salary. I read the meters but sometimes I have a man to help me; this comes under the $3,600 salary. The man's name is Dan Dobbins; he works for me in my plumbing shop and I pay him 62½ cents per hour.

I do not believe that we paid any Federal Income Tax in 1929 and 1930. Mr. Fritz made that statement up. I am not sure whether we paid any tax or not, I don't know offhand.

Our state and county taxes in 1929 were $11,180.48; in 1931 they were $504.00. I account for the difference because of depreciation.

I cannot give you the assessed value of our property for those years, that is I cannot say exactly, it is in the neighborhood of between $19,000 and $23,000 for 1931, as- [fol. 145] sessed valuation. Those figures were arrived at after deducting for depreciation each year and adding those depreciations. The Citizens Gas Company sells to some county officers. It sells to the county treasurer, Jesse Henderson. He does not own stock in the company. We sell to Tom Anderson, county commissioner. He owns $100 worth of stock in the Citizens Gas Company. Byrne has no stock in the Citizens Gas Company; the county assessor has no stock. We do not sell him.

I think the Great Northern Utilities Company sells to all other county officers. It does not sell gas to Toole County.

Redirect examination:

In figuring my cost of gas per M cubic feet of gas sold for each of the three years, 1929 through 1931, I have taken up as part of the operating expenses of the company the interest on the funded debt, the interest on the floating debt, and miscellaneous deduction due to amortization of franchise. For instance, in 1929, our operating expenses, exclusive of depreciation and taxes amounted to $9,922.77 and our interest on funded debt and miscellaneous deductions for amortization of franchise and organization total $3,360.74; total taxes $1,180.48, so that if I were to give you the figure, the cost of operations for one thousand cubic feet excluding gas purchased, depreciation, interest on funded debt, interest on floating debt and miscellaneous deductions my cost per M cubic feet would be considerably under the figure which I have heretofore given in this record. Our operating revenues in 1929, exclusive of depreciation were $9,922.77, plus $1,180.48; that is exclusive of cost of gas and depreciation but including taxes.

Item 10 of our annual report for the year 1929 which you asked me to look at shows an item of $2,292.84 as cost of production; that is the cost of gas and is included in the sum $9,922.77. So that the record might be straight and because the figures have been given in a miscellaneous fashion, I will verify the operating expenses for 1929:
[fol. 146] Production, cost of gas $2,292.84; distribution $980.24; commercial, $628.72; general $5,637.99; undistributed $382.98; depreciation $5,426.50, taxes $1,180.38, or a total operating expense including cost of gas and depreciation of $16,529.75, showing a net operating revenue of $5,145.49. Those figures just given are correct so that in the year 1929 before I made any deduction from gross income for interest on funded debt and interest on floating debt for amortization of franchise, our revenues and expenses showed a net operating revenue of $5,145.49.

The figures that I have given for the year 1930 as to the cost of operation per M cubic feet of gas sold, exclusive of cost of gas and exclusive of depreciation, also contain these charges, interest on funded debt $2,126.33, interest on floating debt $373.41, miscellaneous deductions for amortization of franchise, $3,186.31, so that to arrive at our cost of operation per M cubic feet, excluding the item of

depreciation and cost of gas, I should also eliminate the interest on the funded debt, interest on floating debt and these miscellaneous deductions.

For the year ended December 31, 1931, I also gave the figure of operating costs per M cubic feet of gas, excluding the item of gas purchased and depreciation, but in computing that figure I did consider as part of the operating expenses interest on the funded debt $1,691.72; interest on the floating debt $54.85; and miscellaneous deductions for amortization of franchise of $1,329. When I said we were in the red in 1931, I meant we were in the red after we made the deductions from the gross income. In 1931 we actually show a net operating revenue of $1,716.67 and in 1930, for the year ended December 31, we also show a net operating revenue, and when I say we were in the red for that year, I meant after deducting the items of interest on the funded debt, floating debt, and miscellaneous deductions [fol. 147] for amortization of franchise. When I said that we are charging 12½ per cent depreciation on real property, I did not mean that literally, I meant physical property—on the piping, meters, regulators. We don't depreciate the real property out where the regulator house is. The regulator house only cost $100. It is a tin shack and we don't own the ground that it stands on.

Recross-examination:

I figured out the cost of gas per M cubic feet and our expenses per M cubic feet from the report. I took the expenses from the report and figured it, divided it into millions of cubic feet of gas used. Our line losses between the well and the town were about five per cent. Previous to that we had it down to about two per cent, that was the Newman well.

The new well has only been in since the middle of July, it is tight. Our accounts are all kept under the supervision of the commission.

Thereupon defendants rested.

Be it further remembered that on the 19th day of September, 1932, and before the evidence and proceedings received and taken before the said Examiner were received in evidence upon the final hearing herein, defendants pre-

sented the objections hereinabove mentioned and each of them to the Court for its rulings thereon and the Court announced that the objections and each of them would be considered and ruled upon by the Court in the decision of the Court upon the merits and final hearing and that exceptions would be duly allowed the defendants to the Court's rulings on the said objections and each of them, and the Court having overruled the said objections of the defendants and each of them in its decision herein upon the merits and final hearing, exceptions were duly allowed to defendants to the Court's rulings on the said objections and each of them.

[fol. 148] That the above and foregoing is all the evidence introduced at the trial of said cause and contains all proceedings had in the trial thereof necessary for a review of the rulings assigned as error on this appeal.

Wherefore the defendants and appellants pray that the above statement of evidence be settled, approved and allowed by the above-entitled Court as a true, full and complete statement of all the evidence taken and given on the trial of said cause, for use on the appeal taken to the Supreme Court of the United States.

Dated at Helena, Montana, this 29th day of November, 1932.

L. A. Foot, Attorney General of the State of Montana; Francis A. Silver, Counsel Public Service Commission of Montana, Attorneys for Defendants and Appellants.

Service of the foregoing proposed statement of evidence admitted and receipt of a copy thereof acknowledged this — day of November, 1932.

E. G. Toomey, Gunn, Rasch, Hall & Gunn, Attorneys for Plaintiff and Appellee.

[File endorsement omitted.]

[fols. 149 & 150] In United States District Court

Order Approving Statement of Evidence—Filed Dec. 15, 1932

On this 15th day of December, 1932, came on for consideration the matter of approval of the Statement of Evi-

dence lodged herein by defendants above named, and it appearing to the court that the ten days' notice of this hearing has been given to the plaintiff as required by Equity Rule 75, and it further appearing that the parties hereto have filed their written stipulation herein agreeing that said statement of evidence is a correct statement under paragraph B of Equity Rule 75, and it further appearing that such statement is true, complete, and properly prepared,

It is Ordered by the Court that the same be, and is hereby approved as part of the record herein for the purpose of the defendants' appeal to the Supreme Court of the United States.

Bourquin, Judge.

[File endorsement omitted.]

[fol. 151] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed Dec. 6, 1934

It is hereby stipulated and agreed by and between E. G. Toomey and Gunn, Rasch, Hall and Gunn, counsel for plaintiff and appellee, and L. A. Foot and Francis A. Silver, counsel for defendants and appellants, that the papers of record which shall constitute the Transcript of Record on Appeal to the Supreme Court of the United States herein shall consist of the following:

1. Bill of Complaint.
2. Motion to Dismiss Bill of Complaint.
3. Answer to Bill of Complaint.

3½. Proposed amendment to bill of complaint and defendants' objections thereto.

4. Minute Entry of Proceedings in the Above Cause on September 19, 1932.
5. Written Opinion of Court filed on October 5, 1932.
6. Findings of Fact and Conclusions of Law filed October 15, 1932.
7. Permanent Injunction Decree or Order issued and dated October 15, 1932.

8. Petition for Appeal.

9. Assignments of Error and Prayer for Reversal.

10. Statement of Basis of Appellate Jurisdiction.

11. Order allowing Appeal.

[fols. 152 & 153] 12. Citation on Appeal and Service Thereon.

13. Statement Under Paragraph 3 of Rule 12 of United States Supreme Court Rules.

14. Statement of Evidence as allowed, approved, and settled.

15. This stipulation.

And the Clerk of the above-entitled court is requested to forward to the Clerk of the Supreme Court at Washington, D. C., only the papers designated herein.

This stipulation is made and entered into pursuant to Rule 10, of the Supreme Court of the United States.

Dated this 5th day of December, 1932.

E. G. Toomey, Gunn, Rasch, Hall and Gunn, Counsel for Plaintiff and Appellee. L. A. Foot, Attorney General of the State of Montana; Francis A. Silver, Counsel Public Service Commission of Montana, Counsel for Defendants and Appellants.

[File endorsement omitted.]

[fol. 154] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE PROPOSED AMENDMENT TO BILL OF COMPLAINT AND OBJECTIONS THERETO—Filed Dec. 27, 1932

It is hereby stipulated and agreed by and between E. G. Toomey and Messrs. Gunn, Rasch, Hall and Gunn, counsel for plaintiff and appellee, and L. A. Foot and Francis A. Silver, counsel for defendants and appellants, that the proposed amendment to the Bill of Complaint herein, presented to the court by the above-named plaintiff on September 19, 1932, was in words and figures as follows:

"(Title of Court and Cause)

"Plaintiff's Proposed Amendment to Bill of Complaint

"Now comes the plaintiff and alleges as an amendment to its bill of complaint to be designated as paragraph XXI-A and to be inserted after paragraph XXI on page 7, as follows:

"XXI-A

" 'That the rates prescribed by and fixed in said order are insufficient to furnish plaintiff a fair or any return on the value of its gas plant or system and such rates, if made effective, would confiscate and deprive this plaintiff of its property in said gas plant or system, without due process of law, in violation of the 14th Amendment'."

[fol. 155] That the objections to plaintiff's proposed amendment to the Bill of Complaint herein, as orally made in open court on September 19, 1932, by the defendants, were in words and figures as follows, to-wit:

"That defendants, and each of them, object to the amendment offered to the complaint at this time on the grounds and for the following reasons:

"First. The application to amend has not been seasonably made. The matters sought to be introduced by amendment at this time were known to the plaintiff at the time the Bill of Complaint was filed on December 22, 1930, almost two years ago, and at no time up until the present has any application to amend been made.

"We further object to the proposed amendment at this time on the grounds that the amendment, if allowed, would introduce an entirely new cause of action.

"We further object on the grounds that the matters sought to be introduced by the amendment, if allowed, would make an essential change in the character or object of the original suit.

"We further make the objection that plaintiff having failed to make seasonable application for leave to amend and having failed to make any application to amend prior to the taking of evidence herein before the Examiner appointed by the Court, defendants were not at the time of

hearing before the Examiner in a position to meet the new issues which the Bill of Complaint, if amended, would seem to proffer. We went to Shelby without any knowledge that any attempt would be made to introduce evidence as to whether or not the rates prescribed by the Commission would provide a fair return to the utility. And, for the first time, when they sought to introduce evidence on this score we raised an objection.

"And we make the further objection—I have just one paragraph which I would like permission to read; it is alleged here 'that the rates prescribed by and fixed in said order are insufficient to furnish plaintiff a fair or any return on the value of its gas plant or system and such [fol. 156] rates, if made effective, would confiscate and deprive this plaintiff of its property in said gas plant or system, without due process of law, in violation of the 14th Amendment'. We object further on the grounds that the complaint, if amended, would be insufficient and would not state facts sufficient to show that plaintiff is entitled to any relief on the grounds that the rates prescribed would not return a fair rate of return to the plaintiff.

"We further object on the grounds that the manner of stating their objections on confiscation would introduce into the complaint ambiguity, unintelligibilty and uncertainty, and further that there is not set forth in the proposed amendment the claimed rate base, nothing to show operating revenues nor what their operating revenue would be under the prescribed rate, nor their operating costs.

"In other words, it merely sets forth the legal conclusions of the pleader and pleads no facts upon which issue can be taken.

"As further objection to the proposed amendment we maintain plaintiff is estopped to make the amendment sought because it only prays for, in its prayer, as follows: that an interlocutory injunction issue, and so forth, and, quoting: 'enjoining and restraining said defendants from in any manner preventing or interfering with the plaintiff in charging and collecting any rates for gas not discriminatory less than the rates prescribed by said order' " end of quotation. Plaintiff is only asking this Court to enjoin the Commission from interfering with the charging of rates by it which are less than the rates prescribed by our order and therefore it is not in position to raise the question as to

whether or not the top rate or specific rate prescribed by the Commission is confiscatory. The question is hypothetical and moot at this time. It is limited by the case pleaded which does not present a justiciable issue on this score.

"Those are our objections to the proposed amendment at this time."

[fol. 157] That this stipulation is entered into and filed in the above-entitled court and cause in order to fully effectuate the stipulation heretofore filed in said court and cause on the 6th day of December, 1932, relative to the contents of the transcript of record on appeal to the Supreme Court of the United States, and in particular, Item 3½ thereof.

Dated at Helena, Montana, this 27th day of December, 1932.

E. G. Toomey, Gunn, Rasch, Hall and Gunn, Counsel for Plaintiff and Appellee. L. A. Foot, Attorney General of the State of Montana; Francis A. Silver, Counsel Public Service Commission of Montana, Counsel for Defendants and Appellants.

[File endorsement omitted.]

[fol. 158] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 159 & 160] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed—Filed Jan. 14, 1933

Come now the appellants in the above-entitled cause and adopt their assignments of error as their statement of the points to be relied upon and state that the whole of the record, as filed, is necessary for the consideration of the case.

Dated at Helena, Montana, January 4, 1933.

Raymond T. Nagle, Attorney General of the State of Montana, residing at Helena, Montana; Francis A. Silver, Counsel Public Service Commission of Montana, residing at Helena, Montana, Attorneys for Appellants.

Service of the above and foregoing statement is hereby admitted and receipt of a copy thereof acknowledged this 4th day of January, 1933.

E. G. Toomey, Gunn, Rasch, Hall and Gunn, Attorneys for Appellee, by M. S. Gunn, of Counsel.

[fol. 161] [File endorsement omitted.]

Endorsed on cover: File No. 37,324. Montana D. C. U. S. Term No. 627. Public Service Commission of Montana, Tom Stout, Thomas E. Carey, et al., etc., appellants, vs. Great Northern Utilities Company. Filed January 14, 1933. File No. 37,324.

FILE COPY

Office Supreme Court
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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 627

PUBLIC SERVICE COMMISSION OF MONTANA, DAN BOYLE, LEE DENNIS, AND LEONARD YOUNG, MEMBERS OF SAID COMMISSION, AND L. A. FOOT, ATTORNEY GENERAL OF THE STATE OF MONTANA, APPELLANTS,

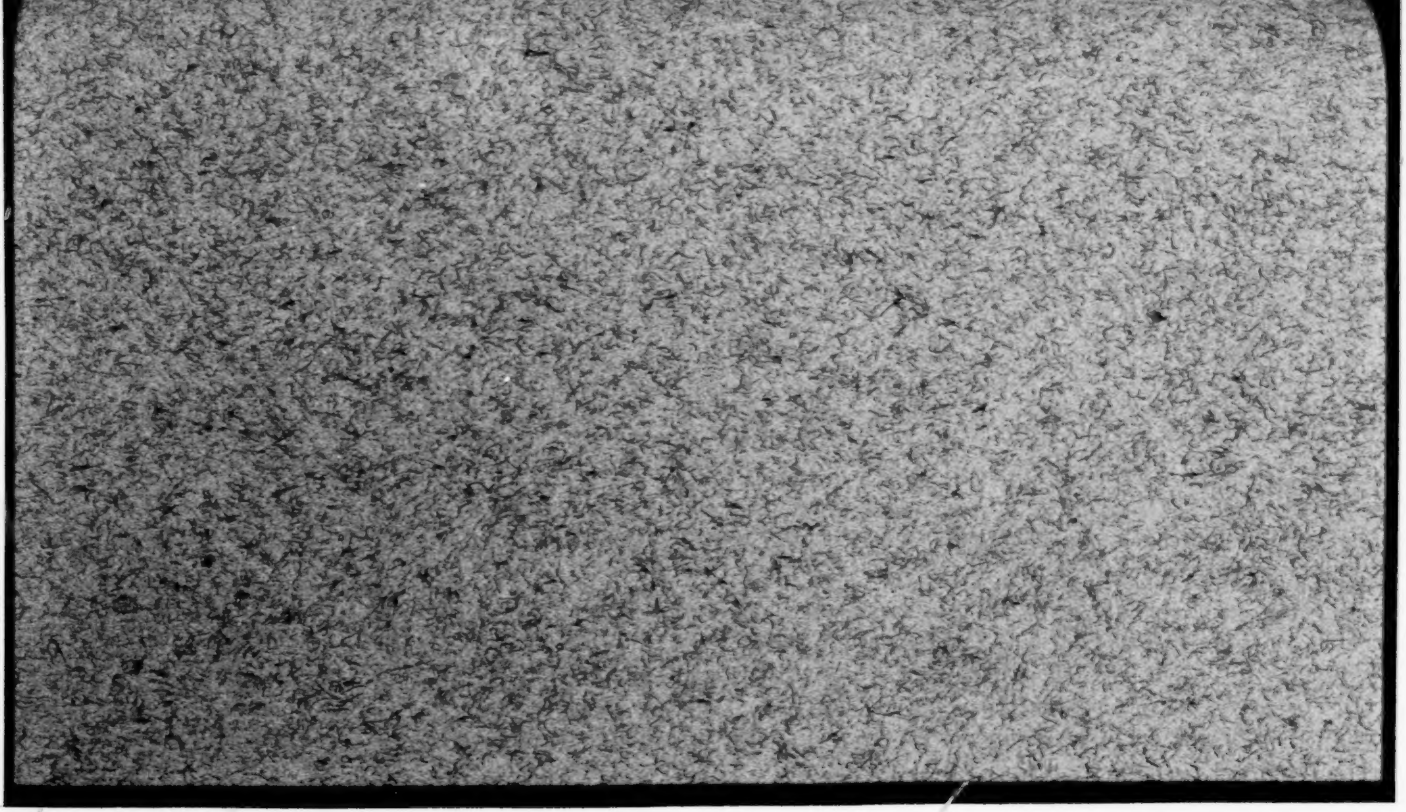
vs.

GREAT NORTHERN UTILITIES COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

STATEMENT AS TO JURISDICTION.

L. A. FOOT,
Attorney General of Montana;
FRANCIS A. SILVER,
Counsel, Public Service Commission of Montana,
Counsel for Appellants.



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IN THE

District Court of the United States in and for the District of Montana

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No. 1060

GREAT NORTHERN UTILITIES COMPANY,
PLAINTIFF,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA, DAN BOYLE, LEE DENNIS, AND LEONARD YOUNG, MEMBERS OF SAID COMMISSION, AND L. A. FOOT, ATTORNEY GENERAL OF THE STATE OF MONTANA, DEFENDANTS.

STATEMENT OF BASIS OF APPELLATE JURISDICTION.

Pursuant to the provisions of Supreme Court Rule 12, paragraph 1, the above-named defendants and appellants file this their statement showing the basis on which said defendants and appellants contend that the Supreme Court of the United States has jurisdiction

upon appeal to review the permanent injunction decree and order appealed from herein, as follows:

I.

The statutes believed to sustain the appellate jurisdiction are Sections 238 and 266 of the Judicial Code, as amended (28 U. S. C. A., Secs. 345 (3) and 380).

II.

The statute of the State of Montana, the validity of which is involved, is Chapter 52, Laws of Montana, 1913, embodied in the Revised Codes of Montana, 1921, as sections 3879 to 3913, both inclusive (pps. 1420 to 1432, Vol. I, Revised Codes of Montana, 1921).

That the provisions of said Chapter 52, Laws of 1913, *supra*, that are pertinent to the appeal provide that every public utility operating within the State of Montana shall file with the Public Service Commission schedules showing all rates and charges established by said public utility for any service performed by it within the State; also, all rules and regulations that in any manner affect the rates charged, or to be charged, for any service, and that no change shall thereafter be made in such schedules except upon twenty (20) days' notice to the commission, unless a reduction is involved in which case a lesser time may be prescribed by the commission, subject to the following proviso:

> "*Provided, however,* that no advance or reduction of existing schedules shall be made without the concurrence of the commission."

III.

The date of the decree sought to be reviewed herein is October 15, 1932, and the date upon which the application herein for appeal is presented is the 26th day of November, 1932.

IV.

The appeal herein is from a permanent injunction decree and order granted by a specially constituted district court convened under the provisions of Section 266 of the Judicial Code, as amended (28 U. S. C. A. 380), restraining the Public Service Commission of Montana, its members, and the Attorney General of the State of Montana from enforcing an order issued by the Public Service Commission of Montana on January 22, 1929, requiring the Great Northern Utilities Company, plaintiff and appellee, to file and establish certain natural gas rates for application in Shelby, Montana.

V.

The cases believed to sustain the jurisdiction are as follows:

Stratton v. *St. Louis S. W. Ry. Co.*, 282 U. S. 10, 51 S. Ct. 8, 75 L. Ed. 135;

Ex Parte Buder, 271 U. S. 461, 46 S. Ct. 557, 70 L. Ed. 1036.

Dated at Helena, Montana, this 26th day of November, 1932.

Respectfully submitted,

L. A. FOOT,
Attorney General of the State of Montana;
FRANCIS A. SILVER,
Counsel, Public Service Commission of Montana,
Attorneys for Defendants and Appellants.

(2884)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 627

PUBLIC SERVICE COMMISSION OF MONTANA, THOMAS E. CAREY, TOM STOUT AND LEONARD YOUNG, MEMBERS OF SAID COMMISSION, AND RAYMOND T. NAGLE, ATTORNEY GENERAL OF THE STATE OF MONTANA, APPELLANTS,

vs.

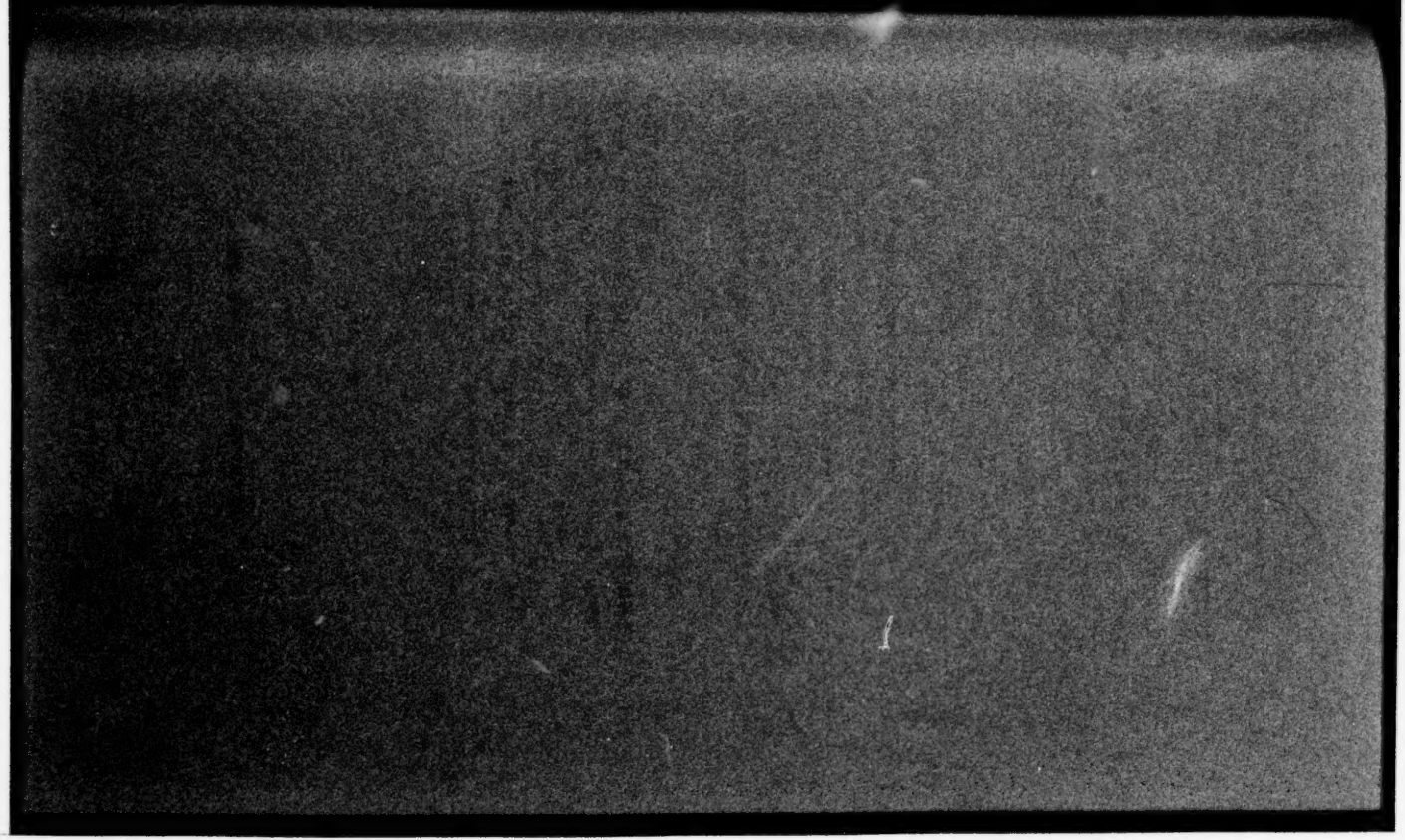
GREAT NORTHERN UTILITIES COMPANY APPELLEE

Appeal from the District Court of the United States, in and for the District of Montana.

BRIEF FOR APPELLANTS

RAYMOND T. NAGLE,
Attorney General of Montana;
FRANCIS A. SILVER,
Counsel, Public Service Commission of Montana,
Counsel for Appellants.

March, 1933.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 627

PUBLIC SERVICE COMMISSION OF MONTANA, THOMAS E. CAREY, TOM STOUT AND LEONARD YOUNG, MEMBERS OF SAID COMMISSION, AND RAYMOND T. NAGLE, ATTORNEY GENERAL OF THE STATE OF MONTANA, APPELLANTS,

vs.

GREAT NORTHERN UTILITIES COMPANY
APPELLEE

Appeal from the District Court of the United States, in and for the District of Montana.

APPELLANTS' BRIEF.

This is an appeal under sections 238 and 266 of the Judicial Code, as amended, (28 U. S. C. A. 345 (3), 380) from a final decree of the District Court of the United States, District of Montana, granting a permanent enjoining the enforcement

of an order of the Public Service Commission of Montana, requiring appellee to file and establish certain *specific* natural gas rates for application in Shelby, Montana.

OPINIONS

The opinion of the specially constituted District Court on final hearing is reported in 1 F. Supp. 328. The opinion of the court granting the application for an interlocutory injunction is reported in 52 F. (2d) 802. A special concurring opinion of Sawtelle, Circuit Judge, is reported in 52 F. (2d) 805. The views expressed in the opinions on the application for interlocutory injunction are adopted in the opinion on final hearing. 1 F. Supp. 328.

STATEMENT OF THE CASE

The appellee (plaintiff below), Great Northern Utilities Company, a corporation, (hereinafter termed the Utility,) is now and since the year 1923 has been engaged in the business of furnishing and supplying natural gas to the public generally at Shelby, Toole County, Montana. (R. 1), carrying on its operations within the city of Shelby under the terms of a franchise duly granted and assigned to the Utility (R. 2).

The franchise provides *inter alia*, that:

> "Section 3. The rates to be charged for gas of whatsoever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of Montana shall order and determine." (R. 11.)

The Board of Railroad Commissioners of the State of Montana is ex-officio Public Service Commission of Montana, (Sec. 2, Ch. 52, Laws of Montana, 1913; Sec. 3880 Revised Codes of Montana, 1921).

The Utility's plant or system was designed and intended and is capable of supplying natural gas for the present and future requirements of all the people of Shelby (R. 3). Until this present dispute, the Utility has charged for its product such rates as have been approved by the Public Service Commission of Montana, (hereinafter termed the Commission).

On September 21, 1927, the Commission, upon its own initial motion, instituted an inquiry into the reasonableness of the rates charged by the Utility (R. 43). The rates in effect at that time commenced with a base rate of 60 cents per M cubic feet (R. 43). During the progress of the investigation, the Utility lowered its base rate to 50 cents per M cubic feet and made certain reductions in the lower steps (R. 43). These rates were approved tentatively by the Commission but the proceeding investigating into the reasonableness of the rates charged by the Utility was continued by the Commission and public hearings were had thereon at Shelby on November 29, 1927, and October 1, 1928 (R. 44).

Before the proceedings in Docket No. 991 were instituted, to-wit, in January, 1927, the city council of Shelby duly granted a gas franchise to the Shelby Oil and Gas Company (R. 3), and by assignment this franchise passed to the Citi-

zens Gas Company (R. 3-4). The franchise, except for the designation of the grantee and its dating, is identical in terms with the franchise under which the appellee operates (R. 12-13). During the latter part of 1928, and before any decision was rendered in Docket No. 991, the Citizens Gas Company constructed a natural gas plant or system in Shelby and in October, 1928, entered into actual competition with the appellee for the natural gas business available in Shelby (R. 5). An initial tariff was filed by the Citizens Gas Company with the Commission stating rates for natural gas service commencing with a base rate of 35 cents per M cubic feet and graduated to 22½ cents per M cubic feet for quantities in excess of 300,000 cubic feet (R. 5; R. 45). At the time of the entry of the Citizens Gas Company into the Shelby field, the Utility had 485 customers, but within a brief period, 137 of that number ceased to purchase gas from the Utility and became customers of the Citizens Gas Company (R. 5). On November 8, 1928, the Utility filed a schedule of rates with the Commission proposing to establish a base rate of 25 cents per M cubic feet (R. 5, R. 45). Before action was taken thereon, to-wit: on November 19, 1928, the Utility filed its "schedule 4-A sheet 2" which called for a base rate of 20 cents per M cubic feet up to 300,000 cubic feet and 15 cents per M cubic feet for all quantities over 300,000 cubic feet (R. 6, R. 45). The Citizens Gas Company filed a protest with the Commission against said schedule, asserting that the rates

proposed were "unfair, unjust and unreasonable" (R. 6, R. 45). This complaint was dismissed. (R. 103). In the meantime, on November 30, 1928, the Commission on its own motion in its Docket No. 1028, ordered the Utility to be and appear before it at Shelby on December 20, 1928, to submit evidence in support of the reasonableness and justness of the rates and charges proposed in schedule 4-A sheet 2 (R. 6, R. 45). Public hearing was held at the time and place scheduled (R. 6, R. 45). The Citizens Gas Company and 12 customers of said company appeared before the Commission and contended that the said rates proposed by the Utility were not proposed in good faith (R. 6, R. 45-46). The Utility also presented evidence to the Commission. No evidence was introduced tending to show the Utility's probable operating revenues and expenses under the proposed schedule (R. 66). The Utility asserted that the rates contained in schedule 4-A sheet 2 were not reasonable rates from its standpoint but were justified under the competitive conditions existing at Shelby (R. 66). It also further stated that in the event the Citizens Gas Company would meet the rates proposed in schedule 4-A sheet 2, the Utility would propose further reductions (R. 66).

On January 22, 1929, the Commission issued its Report and Order No. 1530 covering both dockets—991 and 1028 (R. 43 et seq.). Its finding in Docket No. 1028 was that the rates contained in schedule 4-A sheet 2 would not yield enough revenue to defray normal operating ex-

penses, including a fair allowance for depreciation under conditions existing at Shelby, nor would they provide sufficient income to cover normal operating costs if conditions were the same as they had been during the calendar year 1927 when the Utility sold more natural gas than it had during any year since its entry into the utility field, a time when it had no competitor (R. 69). The Commission further found that because the schedule of rates proposed would not produce normal operating expenses, the establishment of the same would tend to imperil or impair the ability of the Utility to render dependable adequate service to the public (R. 69-70), and that it would tend to prevent the Utility from discharging its primary duty to properly maintain its plant and equipment to the end that it would be able to render adequate service to the residents of the territory it professed to serve; and the Commission further found that by reason thereof, the proposed schedule was contrary to the public interest and therefore, unjust and unreasonable (R. 69). The Commission refused to concur in the proposed schedule 4-A sheet 2 (R. 70).

In Docket No. 991, the Commission found that the rates that were in effect at the time the inquiry was commenced and the rates that were approved tentatively, pending investigation, were and are unjust and unreasonable (R. 64). This finding was based upon a determination of the fair value of the Utility's property, used and useful, devoted to the natural gas service at

Shelby, and an analysis of the revenues and expenses of the Utility for the calendar year 1927, and the twelve months ending August 31, 1928 (R. 64), and a consideration of the volume of business available at Shelby (R. 64). Upon the evidence before it, the Commission made a finding that a schedule of just and reasonable rates for application by the Utility at Shelby should commence with a base rate of 35 cents per M cubic feet for the first 10,000 cubic feet and graduate to 22½ per M cubic feet for all over 300,000 cubic feet (R. 77). This schedule is the same as the one approved for the Citizens Gas Company (R. 4). The Utility was ordered to establish the schedule found just and reasonable on or before February 1, 1929 (R. 14, R. 78).

On February 8, 1929, the Utility commenced an action in the district court of the First Judicial District of the State of Montana, Lewis and Clark County, for the cancellation of the order as illegal (this statement as to the date of commencement of the action in the state court is not a part of the record before this court but will be found in State ex rel. Public Service Commission v. Great Northern Utilities Company, 86 Mont. 442, 444-445, 284 Pac. 772, of which this court will take judicial notice). The Utility was awarded a judgment on the pleadings against the Commission and a decree entered declaring the order null and void and enjoining its enforcement. An appeal was prosecuted by the Commission to the Supreme Court of the State of Montana where the judgment of the lower court

was reversed and the cause remanded for further proceedings (Great Northern Utilities Co. v. Public Service Commission, 88 Mont. 180, 293 P. 294). Subsequently, a petition for rehearing was denied (88 Mont. 232, 293 P. 294). This action was then commenced by the Utility, thus creating the situation whereby it was prosecuting concurrently in the state and federal court an action to have the order of the Commission declared invalid. Upon the case in the state court being set down for trial at the instance of the Commission, after the reversal above referred to, the Utility took a voluntary dismissal of the state case. There was, therefore, no final judgment entered in the state case.

The instant bill of complaint is in substance the same as the one that was involved in Great Northern Utilities vs. Public Service Commission, 88 Mont. 180, 293 Pac. 294.

The legal contentions of the Utility, as set forth in the bill of complaint, may be succinctly stated as follows:

1. The Commission is without authority or jurisdiction to fix or establish *specific* or *minimum* rates or to require a utility to increase rates voluntarily promulgated by it which are less than just and reasonable rates. (R. 6).

2. If the Commission has been authorized by the Public Service Commission Act of Montana (Ch. 52, Laws of 1913; Secs. 3879 to 3913 inclusive, Revised Codes of Montana, 1921) to fix *specific* or *minimum* rates, or to require increases

in rates, voluntarily established by a utility, which are less than just and reasonable rates, such authorization is in violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, in that: (a) Section 3891 Revised Codes of Montana, 1921, which provides "that no advance or reduction of the existing schedule shall be made without the concurrence of the commission" authorizes the Commission arbitrarily and without notice or a hearing or any opportunity for a hearing to refuse to concur in rates less than the rates prescribed or approved by the Commission as just and reasonable and section 3892 makes it unlawful for utility to charge, demand, collect etc. a greater or lesser compensation for services performed than the rate prescribed by or approved by the Commission (R. 8) and (b) there are no rules or principles prescribed governing or controlling the Commission in fixing or determining minimum rates. (R. 9).

3. The order of the Commission requiring the Utility to charge the schedule of rates prescribed by the Commission is violative of the equal protection and due process of law clauses of the Fourteenth Amendment in that the effect of the order is (a) to deprive the Utility of "*the right of competition,*" for the purpose of retaining its customers and for the protection and preservation of its investment in its gas plant or system, (R. 6), and (b) to deprive the Utility of its property, consisting of said gas plant or system (R. 6) and (c) to deprive it of the right

and liberty to contract for the furnishing of gas at the rates promulgated by it, which are less than the rates fixed by the Commission. (R. 7).

4. The Commission, in making and promulgating said order, acted without jurisdiction in that there was no evidence introduced before or considered by said Commission showing or tending to show that the rates prescribed are just or reasonable, or that the rates promulgated by the Utility are unjust or unreasonable and said order was made arbitrarily and capriciously. (R. 7).

5. Section 3908 Revised Codes of Montana, 1921, relating to penalties for failure to comply with orders of the Commission, prescribes penalties so large and severe as to amount to a denial of equal protection of the laws and deprives plaintiff of its property without due process of law. (R. 7-8).

6. Section 3906 Revised Codes of Montana, 1921, providing that all rates fixed by the Commission shall be deemed reasonable and just and shall remain in full force and effect until final determination of their invalidity by the courts having jurisdiction, denies the Utility equal protection of the law and deprives it of its property without due process of law. (R. 8).

The prayer of the complaint is that the order and rates be declared illegal and that the defendants be restrained "from in any manner preventing or interfering with the plaintiff in charging and collecting any rates for gas, not discrimina-

tory, *less than the rates prescribed by said order.*" (Italics ours) (R. 9).

A motion to dismiss the complaint for want of equity was filed by the defendants. (R. 15). The motion was never *expressly* passed upon by the lower court. Subsequently, the defendants filed a joint answer (R. 15). An interlocutory injunction was granted on August 19, 1931, (52 F. (2d) 802). An appeal was prosecuted to this Court and the order granting the interlocutory injunction was affirmed. (285 U. S. 524).

Final hearing was held on September 19, 1932, upon evidence theretofore taken before an Examiner appointed by the Court. Objection to the introduction of evidence was seasonably made by the defendants, assigning the same grounds urged in the motion to dismiss. (R. 43).

The Utility attempted to amend its complaint at the final hearing by adding an allegation, in general language, to the effect that the rates prescribed by the Commission are insufficient to furnish plaintiff a fair or any return upon the value of its gas plant. (R. 114). Defendants objected to the amendment on various grounds. (R. 114). The court disallowed the amendment, terming it "unnecessary" (R. 23).

On October 5, 1932, the lower court handed down its decision awarding a permanent injunction. (R. 22). In its opinion the Court states that its views and findings as expressed in its decision upon the application for interlocutory injunction are unchanged. (R. 23). On October 15, 1932, District Judge Bourquin "for the court"

filed "Findings of Fact and Conclusion of Law" (R. 23), and on the same day entered a formal decree permanently enjoining the defendants from enforcing the order complained of and "from, in any manner, interfering with the plaintiff in charging and collecting rates * * * *less than the rates prescribed by said order.*" (R. 25). (Italics ours).

STATUTES INVOLVED

Sections 3891, 3906 and 3908, Revised Codes of Montana of 1921, attacked herein in the bill of complaint as being unconstitutional are set forth *in toto* in the Appendix to this brief, as are Sections 3880, 3883, 3888, 3899, 5074, 5075, 5076 and 5077, Revised Codes of Montana, 1921, same being relevant sections.

The order of the Commission enjoined by the lower court, aogether with the Commission's report accompanying same, are incorporated in the Statement of the Evidence (R. 43-78).

SPECIFICATIONS OF ERRORS

Appellants specify the following errors:

1. The United States District Court for the District of Montana erred in failing to grant the motion interposed by the defendants to dismiss the bill of complaint filed in the above-entitled cause on the ground that the bill of complaint does not state facts sufficient to constitute a valid cause of action in equity, or at all. (R. 27).

2. The United States District Court for the District of Montana erred in overruling the ob-

jections of the defendants herein to the introduction of any evidence on behalf of the complainant on the ground and for the reason that the bill of complaint herein does not state facts sufficient to constitute a cause of action in equity, or at all. (R. 27).

3. The United States District Court for the District of Montana erred in adjudging and decreeing that the order complained of by plaintiff is null and void. (R. 27).

4. The United States District Court for the District of Montana erred in adjudging and decreeing that the order complained of by plaintiff is null and void because the record herein discloses that the specific just and reasonable schedule of rates prescribed by the defendant commission was made, issued, and promulgated to prevent ruinous competition in the premises, under the authority delegated to the defendant commission in Chapter 52, Laws of Montana, 1913, (Chap. 260, Part III, Political Code, Revised Codes of Montana, 1921), as interpreted by the highest appellate court of the State of Montana, to-wit: The Supreme Court of the State of Montana. (R. 27).

5. The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein permanently enjoining and restraining the defendants, and each of them, from enforcing the order complained herein. (R. 28).

6. The United States District Court for the District of Montana erred in rendering a decree

for the plaintiff herein permanently enjoining and restraining the defendants, and each of them, from enforcing the order complained of herein, in that the records do conclusively show that the specific just and reasonable schedule of rates prescribed in said order is neither confiscatory nor discriminatory, but is higher than the schedule of rates being then and there charged by plaintiff, which latter schedule the plaintiff admitted to be insufficient to produce a reasonable return on the present value of its property used and useful in the public service and which schedule of rates plaintiff admitted compelled it to operate at a loss. (R. 28).

7. The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein, in that the evidence conclusively shows that the specific just and reasonable schedule of rates prescribed by the defendant commission was prescribed in the public interest and for the purpose of preventing the plaintiff and the other utility operating in the same field with plaintiff from destroying each other by ruinous competition. (R. 28).

8. The United States District Court for the District of Montana erred in holding that the plaintiff, Great Northern Utilities Company, a public utility, had and possessed, or has or possesses the right to engage in unrestricted competition with Citizens Gas Company, a public utility, engaged in serving the same general field as plaintiff, in the matter of rates or charges to be fixed or charged for the sale and distribu-

tion of natural gas to the public in Shelby, Montana. (R. 28).

9. The United States District Court for the District of Montana erred in holding that the plaintiff, Great Northern Utilities Company, a public utility, had and possessed, or has or possesses the right to engage in a rate-war at or in Shelby, Montana, with its competitor, Citizens Gas Company, a public utility. (R. 29).

10. The United States District Court for the District of Montana erred in failing and refusing to give due or any consideration to the right of the consumers of natural gas at Shelby, Montana, to have reasonably adequate, continuous and uninterrupted natural gas service for domestic, commercial, and industrial uses in Shelby, Montana, from the public utilities therein engaged in selling and distributing natural gas. (R. 29).

11. The United States District Court for the District of Montana erred in holding that the plaintiff Great Northern Utilities Company, a public utility, had or has the right to disable itself by means of engaging in a rate war with Citizens Gas Company, a public utility, from performing its duty to the public to provide reasonably adequate service and facilities to those members of the public attached to its natural gas system and receiving natural gas service therefrom. (R. 29).

12. The United States District Court for the District of Montana erred in holding that the plaintiff Great Northern Utilities Company, a

public utility, had or has the right to disable Citizens Gas Company, a public utility, by means of engaging in a rate war, from performing its duty to the public to provide reasonably adequate service and facilities to those members of the public attached to its natural gas system and receiving natural gas service therefrom. (R. 29).

13. The United States District Court for the District of Montana erred in holding and finding that the evidence is sufficient to prove the allegation of plaintiff's bill of complaint that the population of the city of Shelby, Montana, and the demands for natural gas therein are insufficient to support the public utility natural gas plants and systems of the plaintiff and the Citizens Gas Company, a corporation, at Shelby, Montana. (R. 29).

14. The United States District Court for the District of Montana erred in holding and finding that the evidence presented established that the field served by plaintiff and the Citizens Gas Company, a corporation, as public utilities in the sale and distribution of natural gas, to-wit: Shelby, Montana, is insufficient to support and maintain more than one of the said public utilities. (R. 30).

15. The United States District Court for the District of Montana erred in holding and finding that the specific rates prescribed by the defendant commission for application in Shelby, Montana, will not afford a fair return to plaintiff upon the present fair valuation of its prop-

erty used and useful in the public service. (R. 30).

16. The United States District Court for the District of Montana erred in holding and finding that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford fair returns to plaintiff and the Citizens Gas Company, a corporation, public utilities engaged in the sale and distribution of natural gas to the public at said Shelby, Montana. (R. 30).

17. The United States District Court for the District of Montana erred in holding and finding that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford a fair return to more than one of the public utilities, to-wit: plaintiff and Citizens Gas Company, a corporation, engaged in the sale and distribution of natural gas in said Shelby, Montana. (R. 30).

18. The evidence presented is insufficient to support the finding that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford fair returns to plaintiff and Citizens Gas Company, a corporation, public utilities engaged in the sale and distribution of natural gas to the public at said Shelby, Montana. (R. 31).

19. The evidence presented is insufficient to support the finding of the United States District Court for the District of Montana that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford a fair return to more than one of the public utili-

ties, to-wit: plaintiff and Citizens Gas Company, a corporation, engaged in the sale and distribution of natural gas in said Shelby, Montana. (R. 31).

20. The evidence presented is insufficient to warrant the or any finding by the United States District Court for the District of Montana as to the reasonableness of the natural gas rates prescribed by the Public Service Commission of Montana for observance by plaintiff in its sale and distribution of natural gas to the public at Shelby, Montana. (R. 31).

21. The United States District Court for the District of Montana erred in holding that the pleadings presented an issue as to whether the rates prescribed by the defendant commission would yield a fair return to the plaintiff upon the present fair value of its property used and useful in the public service. (R. 31).

22. The United States District Court for the District of Montana erred in holding that the pleadings are sufficient to present the question of the reasonableness and justness of the rates prescribed by the defendant commission. (R. 31).

23. The United States District Court for the District of Montana erred in failing to find the facts specially and to state separately its conclusions of law thereon as is required by Rule 70½ of the Equity Rules promulgated by the United States Supreme Court June 2, 1930, to take effect October 1st, 1930. (R. 31).

24. The United States District Court for the District of Montana erred in rendering a de-

cree for the plaintiff herein in that the pleadings and evidence conclusively show that the plaintiff is engaged in operating a public utility in the city of Shelby, State of Montana, for the distribution of natural gas under and by virtue of a special franchise granted by the city of Shelby, Montana, a municipal corporation, pursuant to the provisions of Sections 5074 to 5077, both inclusive, of the Revised Codes of Montana, 1921, and that the plaintiff company accepted said special franchise as assignee of the original grantee, subject to the provisions of Chapter 52, Laws of Montana, 1913 (Chapter 260, Part III, Political Code, Revised Codes of Montana, 1921). (R. 32).

25. The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein in that the pleadings and evidence conclusively show that the plaintiff is engaged in operating a public utility in the city of Shelby, State of Montana, for the distribution of natural gas under and by virtue of a special franchise granted by the city of Shelby, Montana, a municipal corporation, pursuant to the provisions of Sections 5074 to 5077, both inclusive, of the Revised Codes of Montana, 1921, and that the plaintiff company accepted said special franchise as assignee of the original grantee, subject to the express proviso contained in said franchise, as follows, to-wit: "Section 3. The rates to be charged for gas of whatsoever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of

Montana shall order and determine," thereby waiving any right it might otherwise have to engage in a rate war with a competitor or to charge any rates or rate lower than specific just and reasonable rate or rates prescribed by the Board of Railroad Commissioners of the State of Montana in its *ex-officio* capacity as Public Service Commission of Montana. (R. 32).

26. The United States District Court for the District of Montana erred in rendering a decree for plaintiff herein on the theory that the specific rate order of the defendant commission is confiscatory in that the Fourteenth Amendment to the Constitution of the United States does not guarantee to plaintiff a reasonable return on the present fair value of its property used and useful in the public service, but guarantees it merely an equal opportunity to secure such reasonable return, which equal opportunity was preserved to plaintiff in the premises by the minimum or specific rate order promulgated by the defendant commission. (R. 33).

27. The United States District Court for the District of Montana erred in rendering a decree for plaintiff herein on the theory that the State must abdicate its regulating power when the field will not support two utilities because plaintiff entered the public utility field as a distributor and seller of natural gas at Shelby, Montana, without any exclusive right to so occupy said field and without any guarantee against competition. (R. 33).

28. The United States District Court for the District of Montana erred in engrafting an

amendment upon Chapter 52, Laws of 1913, (Chapter 260, Part III, Political Code, Revised Codes of Montana, 1921), in conflict with the meaning and interpretation of said chapter as construed by the highest appellate court of the State of Montana, to-wit: the Supreme Court of the State of Montana. (R. 33).

29. The United States District Court for the District of Montana erred in passing upon the issues involved herein in refusing to accept the construction placed upon Chapter 52, Laws of 1913, (Chapter 260, Part III, Political Code, Revised Codes of Montana, 1921), by the highest appellate court of the State of Montana, to-wit: the Supreme Court of the State of Montana. (R. 33).

30. The United States District Court for the District of Montana erred in overruling defendants' objections to the testimony of plaintiff's witness E. R. Foster, stating the conclusions drawn by said witness from plaintiff's exhibit No. 5, in substance to the effect that said exhibit No. 5 indicates that if the rate prescribed by the defendant commission had actually been charged during the periods covered by said exhibit No. 5, to-wit: January 1st, 1929, to July 31, 1932, both inclusive, the plaintiff would not have earned enough to pay operating expenses, including depreciation, and have left a net amount which would produce a fair return based upon the valuation found by said defendant commission. (R. 34).

31. The United States District Court for the District of Montana erred in overruling the de-

fendants' objections to the testimony of plaintiff's witness E. R. Foster, that the total revenue of plaintiff company for the calendar year 1929, applying the rates prescribed by the defendant commission would be $19,753.34. (R. 34).

32. The United States District Court for the District of Montana erred in overruling defendants' objections to testimony of plaintiff's witness E. R. Foster, in substance to the effect that the plaintiff company would, for the calendar year 1929, fall $11,669.64 short of meeting the requirements fixed by the defendant commission after allowances for depreciation and return, if the total revenue of the plaintiff company were computed upon the basis of applying the rates prescribed by the defendant commission to the quantity of natural gas sold by the plaintiff company during the year 1929. (R. 34).

33. The United States District Court for the District of Montana erred in admitting in evidence on behalf of plaintiff over the objection and exception of defendants a document consisting of two pages, headed respectively: "Sheet 1, Great Northern Utilities Company, Gas Department Only, Study of Allowance for Depreciation and Return, Based on Montana Commission Order No. 1530," and "Sheet 2, Great Northern Utilities Company, Gas Department Only, Study Showing Deficit for Three Years and Seven Months Based on Rate Found and Allowances for Depreciation and Return in Commission Order No. 1530, Together with Actual Operating Expenses from Company Records", (Plaintiff's Exhibit No. 5), and which reads as follows:

SHEET 1.

		1929	1930	1931	1932 to July 31st
Value of property as of 1-1-28 p. 15, Commission Order No. 1530	$43,214.22				
Net Additions during year 1928 from company records	3,964.88				
Total at first of year		$47,179.10	$47,573.44	$48,618.55	$48,790.73
Net additions during year		394.34	845.11	172.18	534.60R
Depreciation on Value at 1st of year as allowed in Commission Order No. 1530. (8% on all except Land at $1,300. plus Working Capital at $2,500.)		$ 3,470.33	$ 3,501.88	$ 3,585.16	$ 2,093.74*
4% on net additions during year		15.77	33.80	6.89	1.25 R
Total for depreciation		3,486.10	3,535.68	3,592.05	2,092.49
Return on Value at 1st of year as allowed in Commission Order No. 1530 (8%)		$ 3,774.33	$ 3,085.88	$ 3,889.48	$ 2,276.90*
4% on net additions during year		15.77	33.80	6.89	1.25 R
Total for return		3,790.10	3,839.68	3,896.37	2,275.65
Total Sales, M Cu. Ft.		73,160.5	67,375.0	55,889.0	39,559.5
Depreciation per M Cu. Ft.		$ .0477	$ .0525	$ .0643	$ .0529
Return per M Cu. Ft.		.0518	.0570	.0697	.0575

*Based on 7 months.

R denotes reduction.

SHEET 2.

	1929 Total	1929 Per MCF	1930 Total	1930 Per MCF	1931 Total	1931 Per MCF	1932 to July 31 Total	1932 to July 31 Per MCF
M Cu. Ft. Sold	73,160.5		67,375.0		55,889.0		39,559.5	
Expenses								
Transmission and Distribution	$2,339.76	$ .0320	$2,342.97	$ .0348	$1,843.97	$ .0330	$ 714.05	$ .0181
Commercial	3,229.60	.0442	2,679.47	.0398	1,846.97	.0331	912.71	.0231
General	8,987.64	.1228	8,287.37	.1230	8,071.19	.1444	5,385.04	.1361
Undistributed	1,166.42	.0159	1,247.85	.0185	1,307.75	.0234	1,456.71	.0368
Taxes	1,702.54	.0233	1,007.14	.0149	1,002.18	.0179	606.25	.0153
Total	17,425.96	.2382	15,564.80	.2310	14,072.06	.2518	9,074.76	.2294
Cost of Gas	6,750.82	.0923	5,388.99	.0800	5,399.28	.0966	3,816.80	.0965
Total Expenses	24,176.78	.3305	20,953.79	.3110	19,471.34	.3484	12,891.56	.3259
Depreciation based on allowance by Montana Commission in Order No. 1530	3,486.10	.0476	3,535.68	.0525	3,592.05	.0643	2,092.49	.0529
Fair return based on Montana Commission Order No. 1530	3,790.10	.0518	3,839.68	.0570	3,896.37	.0697	2,275.65	.0575
Total Required Revenue	31,452.98	.4299	28,329.15	.4205	26,959.76	.4824	17,259.70	.4363
Estimate Revenue based on rate p. 26 of Commission Order No. 1530 (Av. Price $27 per M Cu. Ft.)	19,753.34	.2700	18,191.25	.2700	15,080.03	.2700	10,681.07	.2700
Deficit	11,699.64	.1599	10,137.90	.1505	11,869.73	.2124	6,578.63	.1663

(R. 34).

34. The United States District Court for the District of Montana erred in admitting in behalf of plaintiff over the objection and exception of defendants a document headed, "Great Northern Utilities Company, Gas Department Only, Study Showing Application of Montana Commission Report and Order No. 1530 to Actual Sales of Gas for Past Three Years", (Plaintiff's Exhibit 6), and which reads as follows:

	Per M Cu. Ft.			
	1929	1930	1931	1932 to July 31
	$	$	$	$
Operating Expenses exclusive of costs of gas purchased and depreciation allowance (p. 25 of Order No. 1530).	.1354	.1354	.1354	.1354
Actual Cost of Gas from company records	.0923	.0800	.0966	.0965
Depreciation Allowance at 8%, based on Commission Order (p. 25 of Order No. 1530)	.0476	.0525	.0643	.0529
Rate of Return at 8% based on Commission Order (p. 26 of Order No. 1530)	.0518	.0570	.0697	.0575
Total Requirement	.3271	.3249	.3660	.3423
Average Revenue which will result from application of Rate Schedule ordered by Commission (p. 26 of Order No. 1530)	.2700	.2700	.2700	.2700
Deficit	.0571	.0549	.0960	.0723

(R. 38).

35. The United States District Court for the District of Montana erred in overruling defendants' objection to the testimony of plaintiff's witness E. R. Foster, purporting to explain or analyze the data contained in plaintiff's exhibits Nos. 5 and 6, the substance of said witness' testimony being as follows:

That the actual operating expenses of the company per M cubic feet are materially higher than the estimated expenses made by the commission in the order complained of, to-wit: $.1354 per M. cubic feet for the natural gas sold. In Exhibit No. 6, operating expenses have been set up at the figures specified by the commission and to those figures have been added the actual cost of gas per M. cubic feet sold, shown in the company's record. The depreciation allowances and the allowances for return shown on Exhibit No. 6 have been transferred from Exhibit No. 5 and for the periods shown are based upon the commission's figures as indicated in the order complained of for the years 1929 to 1931, inclusive, and the first seven months period of 1932. In comparing the total requirements for all expenses with the average revenue which the commission said would result from their rate schedule as ordered, we find deficits as follows: 1929, $.0571 per M. cubic feet; 1930, $.0549 per M. cubic feet; 1931, $.0960 per M. cubic feet; and for the seven months ending July 31, 1932, $.0723 per M. cubic feet of gas sold. The application of the commission rate to actual gas sales for the same periods shows that those rates are about 7¼ cents per M. cubic feet under that

which would be necessary to wipe out the deficit. This study was prepared to show what might result if all the estimates made by the commission were applied with the exception of the cost of gas, a point which is an actual fact. There may be some question about operating expenses at any time and consequently the estimated expenses as indicated in the commission's order were set up. The only thing in the study that is different from those estimates in the commission's order is the cost of gas, that is, the amount actually paid per M. cubic feet during these periods.

In compiling Exhibits Nos. 5 and 6, witness followed in general the same methods that the commission followed in its report in building a rate.

The revenues shown on sheet 2 of Exhibit No. 5, resulting from the application of the commission rate may be compared against witness' total expense figures exclusive of cost of gas for the same year and show just a slight coverage of the expenses because of taxes, with nothing for cost of gas, nothing for depreciation, and nothing for a fair return. (R. 38).

36. The United States District Court for the District of Montana erred in overruling defendants' objection to plaintiff's witness E. R. Foster's testimony, in substance, to the effect that as a result of the experience since competition commenced and based upon his own personal knowledge, there would not be a wide divergence from the average found by the commission in its

customers' analysis in comparison with a customers' analysis at the present time. (R. 39).

37. The United States District Court for the District of Montana erred in overruling defendants' objection to the testimony of plaintiff's witness E. R. Foster, stating in substance that the spread between expense figures found by the commission of $.1354 per M. cubic feet exclusive of cost of gas, and the witness' figures based on actual operations is about ten cents per M. cubic feet. (R. 40).

38. The United States District Court for the District of Montana erred in overruling defendants' objection to the testimony of plaintiff's witness E. R. Foster, stating in substance to the effect that the spread between the commission's findings as to expense per M. cubic feet and the actual result of the company's experience is so great that in the witness' judgment it would not be affected at all by any change in the 27-cent figure and that the revenue requirements during the four periods indicated on page 2 of Exhibit No. 5 checks from 42.05 cents per M. cubic feet sold to 48.24 cents per M. cubic feet sold, and the requirement of each of the periods was much greater than the top step of the rate set by the commission, to-wit: 35 cents per M. cubic feet, and on the basis of average revenue requirement shown on the witness' exhibit No. 5, it would be necessary for the plaintiff to get an average of approximately 45 cents per M. cubic feet as against the commission's allowance of 27 cents average. (R. 40).

39. The United States District Court for the District of Montana erred in overruling defendants' motion made at the conclusion of the plaintiff's case to strike from the record all of the testimony of plaintiff's witness E. R. Foster relative to the application of the commission's prescribed rate in its report and order No. 1530, and the estimated earnings thereof, and all evidence concerning Exhibits Nos. 5 and 6, and each of said exhibits, for the reasons that the same do not tend to support any issues tendered by the complaint herein, are wholly irrelevant, and on the further ground that the question of the confiscatory character of the rates prescribed by the commission is nowhere put in issue by the complaint herein. (R. 40).

SUMMARY OF ARGUMENT

Appellants' argument in its basic features may be briefly summarized as follows:

The Complaint does not state facts sufficient to constitute a cause of action. Measured by the facts pleaded, the bill of complaint presents but two propositions, neither of which involves a substantial Federal question, namely: Does the Public Service Commission of Montana have the power and authority to prescribe or fix *precise* rates to be charged by a public utility for its service or product? And, if so, is this authority circumscribed in circumstances where there are competing utilities in a limited field?

The Public Service Commission Act of Montana (Ch. 52, Laws of 1913, Secs. 3879-3913 Revised Codes of Montana, 1921) has been con-

strued by the Supreme Court of Montana—the highest appellate court of the State—to clothe the Commission with the power to fix *precise* rates to be charged by a public utility for its product or service. Unless some constitutional inhibition precludes such a construction as lawful, the first question presented must be answered in the affirmative.

Inasmuch as the restraint imposed upon legislative action by the 5th and 14th Amendments to the Federal Constitution is the same, the inhibition, if any, of the Constitution against the State's exercise of *specific* rate-fixing power may be determined by the extent to which the Federal Government has, consistent with the 5th Amendment, exercised specific rate-making authority. It is conceded here, as it must be by reason of the decisions of this Court, that under the Transportation Act of 1920, Congress vested power in the Interstate Commerce Commission the lawful power and authority to fix *minimum* or *specific* rates for rail carriers operating in interstate commerce. The power to regulate interstate commerce is not absolute, but is subject to the limitations and guaranties of the Constitution, among which are those contained in the 5th Amendment. Therefore, the recognition of the power and authority in the Federal Government to fix *minimum* and *specific* rates for interstate utilities involves the recognition that within the field of regulation of intrastate utilities the State has similar power and authority.

The lower court, while recognizing and upholding the authority of the Montana statute in this

respect, engrafted an exception on the statute, inconsistent with the interpretation given the statute by the Montana Supreme Court, to the effect that under conditions of competition between public utilities in a limited field "the law of self-preservation and survival of the fittest invokes the right of competition to the last extremity." In this the lower court erred in two respects: first, in attempting to revise the construction placed upon the Montana statute by its own Supreme Court, and, secondly, in upholding the alleged right of competition.

Whether a state statute shall be construed one way or another is a state question, the final decision of which rests with the courts of the state, and when dealing with state statutes, challenged under the 14th Amendment, a federal court must accept the meaning thereof as construed by the highest court of the state and is not permitted to reexamine the construction as to its propriety or accuracy.

As construed by the State Supreme Court the purpose of the statute is to determine a price which shall be just and reasonable to all concerned —the utility as well as the consumer—and to insure to the consumer reasonable service and to the utility a reasonable return. The construction denies to utilities competing in the same field the right to charge less than the *precise* just and reasonable rates fixed by the Commission. This construction is sound and consonant with the protections and guarantees of the 14th Amendment.

The 14th Amendment does not protect against competition nor does it guarantee to a public utility, operating under a non-exclusive franchise, any right of competition in rate matters. A public utility engages in the business of operating a public utility not by reason of the general right to engage in a lawful business which is part of the liberty of the citizen but only as a privilege to be exercised in virtue of a public grant or franchise. This privilege may be granted or withheld by the state or conferred under such limitations as the state may impose, subject, of course, to the principle that the state may not impose conditions that require the relinquishment of rights guaranteed by the Federal Constitution.

When the Utility accepted the franchise to operate as a public utility at Shelby, it accepted it subject to the limitations, *inter alia*, that the franchise itself was non-exclusive and that the State of Montana reserved the right to regulate its operations in the interest of the public, including the right to fix *precise* just and reasonable rates for its product and service. Both of the limitations being well within the recognized powers of the State, any defect therein from the Utility's standpoint is a "congenital defect" and an appeal to the 14th Amendment to protect property from a "congenital defect" must be in vain. Moreover, the right for which the Utility contends—the right to drive its competitor from the field through "cut-throat" competition—is the right to monoply, which is inconsistent with the character of the Utility's non-exclusive franchise.

The Utility's purpose is to render its franchise exclusive in fact, although not in law, and thus to circumvent the established policy of the State of Montana which does not permit its cities or towns to grant exclusive franchises. Furthermore, the franchise granted by the City of Shelby, upon acceptance, became a binding contract between the city and the grantee and by virtue of section 3 thereof the Utility, as asignee of the grantee, obligated itself to charge only such *specific* just and reasonable rates as the Commission might order and determine.

The question of confiscation due to any inadequacy in the prescribed rates to afford a fair return is not presented by the bill of complaint. There are no allegations in the complaint with respect to those elements which control a determination as to the confiscatory character of rates, viz: present fair value of property or plant, used and useful for the convenience of the public, amount of revenue that the prescribed rates would produce, the reasonable expenses of operation under prudent management, fair allowance for depreciation and fair rate of return. The approved rule of pleading in confiscation cases is that in order to invoke constitutional protection, the facts relied on to restrain the enforcement of rates prescribed under the sanction of state law must be *specifically* set forth, and from them it must *clearly* appear that the rates would *necessarily* deny to the plaintiff just compensation and deprive it of its property without due process of law. Tested by the rule, the bill of complaint

obviously does not tender the issue of confiscation.

Furthermore, the Utility, in its complaint, does not assert any right to charge rates *higher* than the rates prescribed by the Commission. It contends only for the right to charge rates *lower* than those fixed by the Commission as just and reasonable. Its prayer specifically requests that the Commission be enjoined from preventing the Utility from charging rates for natural gas "*less* than the rates prescribed by said order." Under the theory of the complaint, the facts alleged and the relief requested, any question as to the adequacy or inadequacy of the prescribed rates is moot. The question as to whether the rates will afford a fair return is purely hypothetical and until such time as the Utility asserts the right to charge a compensatory or non-confiscatory schedule of rates, there is not present the elements of a justiciable controversy.

Nor, can the *per curiam* order of this Court affirming the interlocutory injunction granted by the lower court be reasonably construed as broadening the issues tendered by the bill of complaint or introducing a new issue not embraced within the complaint. The order of affirmance is to be read only as holding that the discretion of the lower court in granting an injunction *pendente lite* had not been abused.

Nevertheless, the evidence amply supports the conclusion that the prescribed rates are just and reasonable and non-confiscatory. Considering the aggregate volume of sales normally available at Shelby to both utilities, the revenues that would

be derived from such aggregate sales on the basis of the prescribed rates, the reasonable costs of operation under prudent and careful management, the aggregate value of the property devoted to the natural gas service at Shelby, actual operating experience at Shelby has demonstrated that the rates fixed by the Commission are on a *higher* level than is called for by a strict application of the "fair return" rule. In other words, it is fairly apparent from the *actual* experience of the rival utility that the Commission's rates will yield upon the normal aggregate volume of gas sold by both companies, revenues sufficient to defray all the necessary operating expenses of both companies, under reasonable and prudent management, and afford a fair return upon the aggregate value of the two systems. Aggregate revenues being sufficient to provide a fair return upon the aggregate value of property devoted to the public service, failure of the Utility to earn a fair return because of its inability to acquire or hold its share of the patronage does not involve any violation of the 14th Amendment. The state is not compelled by the Constitution to guarantee economic results. The law guarantees only equal opportunities for competition.

The bill of complaint alleges generally the unconstitutionality of sections 3906 and 3908 Revised Codes of Montana, but, because the evidence shows that the Utility has not been and is not now being adversely affected by the sections or either of them, or any action taken thereunder, this Court is not called upon to give any opinion in this respect.

ARGUMENT

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

(Specifications Nos. 1 and 2)

The sufficiency of the Bill of Complaint to state a cause of action in equity or at all was raised by appellants by moving to dismiss the complaint (R. 15) and by objecting to the introduction of any evidence (R. 43). The refusal of the trial court to sustain these objections is made the basis of Specifications of Errors Nos. 1 and 2, supra, (Assignments of Errors Nos. I and II, R. 27).

Omitting reference to the allegations of the Bill of Complaint that have to do with official and corporate capacities, the ultimate facts set forth in the Bill are these:

The Utility, (plaintiff below) is the owner and operator of a natural gas plant or system in the city of Shelby, Montana, which it constructed (at a cost "in excess of fifty thousand ($50,000.00) dollars") and commenced to operate in 1923, under and by virtue of the terms of a franchise granted by the city of Shelby. Its plant or system is so designed and constructed and its supply of natural gas is such that the Utility has and has had since the commencement of its operations and will continue to have for the future, a plant or system and supply of natural gas sufficient to take care of the present and future needs and requirements of the people of said city. From the commencement of its operation up to November, 1928, it charged for its product such rates as were approved by the Com-

mission. During the latter part of 1928, Citizens Gas Company, constructed a plant and system for supplying natural gas to the inhabitants of Shelby, under and by virtue of the terms of a franchise granted by the City of Shelby which is identical in terms and wording except as to dates and grantee named as the Utility's franchise; both carry the proviso that *"The rates to be charged for gas of whatever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of Montana shall order and determine."* Citizens Gas Co. commenced to distribute natural gas in Shelby in October, 1928, under a schedule of rates, approved by the Commission, lower than the rates then in effect and being charged by the Utility. Within a brief period after Citizens Gas Company commenced operations, 137 patrons of the Utility ceased to purchase gas from it and became patrons of Citizens Gas Company. On November 8, 1928, the Utility proposed and filed with the Commission a schedule of rates materially lower than the schedule approved for its rival. Before any action was taken thereon and on November 19, 1928, the Utility proposed and filed a still lower schedule of rates. Upon its own motion the Commission ordered a public hearing to determine the reasonableness and justness of the rates proposed by the Utility on November 19, 1928. After hearing held, the Commission refused to concur in the schedule of November 19, 1928, and issued an order requiring the Utility to establish a schedule of rates in all respects similar to the schedule of rates ap-

proved for the rival company. The Utility refused to and refuses to comply with said order.

In addition to the above facts the bill of complaint contains numerous assertions as to questions of law, conclusions of the pleader as to matter of facts and much by way or argument. These are not admitted by the motion to dismiss nor objection to the introduction of evidence.

> Missouri Pacific R. Co. vs. Norwood, 283 U. S. 249, 254; 75 L. ed. 1010, 1016.

The rule has been correctly and succinctly stated by this Court in Missouri Pacific R. Co. vs. Norwood, supra, as follows:

> "The complaint contains much by way of argument, assertions as to questions of law together with inferences and conclusions of the pleader as to matters of fact. These are not deemed admitted by motion to dismiss. * * * The state laws are presumed valid. The burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity."

Measured by the facts plainly and properly pleaded, the bill of complaint presents but two questions: Has the State authority to fix *precise* rates to be charged by a public utility for its service or product? and if so, is this authority subject to an exception in cases where there is competition between public utilities in the same field of service? The judges composing the special statutory court were all of the opinion that the State possesses the right to prescribe

specific or *absolute* rates (52 F. (2d) 802, 804, 808) but a majority of the lower court were of the view that the Montana statute authorizing the Commission to fix *precise* rates is subject to the exception that when utilities are occupying a limited field they have the right to compete generally and in the matter of rates charged "to the last extremity." (52 F. (2d) 802, 804, 805). The minority of the lower court was of the view that the utilities do not have any constitutional right of competition, (52 F. (2d) 805, 809), but was of the opinion that the precise rates prescribed by the Commission were confiscatory in character. (52 F. (2d) 802, 811). The question of confiscation due to any inadequacy of the rates prescribed is not a question presented by the pleadings, as we shall hereafter show.

THE STATE'S RIGHT TO FIX MINIMUM OR SPECIFIC RATES.

Under Section 11 of the Public Service Commission Act of Montana (3891 Revised Codes of Montana, 1921) every public utility is required to file with the Commission schedules showing all rates, tolls and charges which it has established and it is not permitted to make any advance or reduction therein without the concurrence of the Commission. This section construed in connection with the whole act (Ch. 52, Laws of 1913; Secs. 3879-3913 Revised Codes of Montana, 1921) has been held to clothe the Public Service Commission of Montana with the power to fix the *precise* rate to be charged by a public utility for its product or service.

Great Northern Utilities Co. vs. Public Service Commission, 88 Mont. 180, 293 Pac. 294.

The duties of a public utility within the State of Montana have been fixed by statute. (3883 R. C. M. 1921). Every public utility is required to furnish reasonably adequate service and facilities at just and reasonable rates. (id) "*Not only must the charges be 'just and reasonable' but the service and facilities for rendering that service must be adequate*" (88 Mont. 207). The machinery is provided by the act for bringing about the fulfillment of the purposes of the statute. The obligation rests upon the Commission to see to it that the purposes of the statute are carried out. As pointed out by the Montana Supreme Court (88 Mont. 211):

> "*The Commission is required* not only to regulate charges, but it is likewise made its duty as well *to see to it that reasonable service is rendered*, and that the equipment is reasonable adequate. It is apparent that the legislature intended to clothe the Commission with power to supervise the acts of the Utility in matters other than rate fixing. *The legislature evidently reasoned that intermittent service is as costly, and at least equally detrimental to the public interest, as is an exhorbitant charge for the service.* (Italics ours).

Giving full consideration to the various provisions of the Act, the Supreme Court of Montana properly concluded that (88 Mont. 223):

> "The purpose (of the Act) * * is to determine a price which shall be just and reasonable to all concerned—the utility as well as the consumer—*and to insure to the consumer reasonable service* and to the utility a reasonable return." (Italics ours).

The design and purpose of the act being perfectly clear, it is at once apparent that the power given the Commission to fix *specific* just and reasonable rates has a real and substantial relation to the avowed purpose of the Act. As said by the Supreme Court of Montana (88 Mont. 218-19):

> "*The reasonable service* which the statute requires the utility to furnish, and *which it is made the duty of the Commission to see is furnished, must be paid for out of the revenues derived from the sale of the product of the utility.* 'Service without compensation can not be compelled without violating the Federal Constitution.' (Indianapolis Gas Co. v. Indianapolis; 82 Fed. 245; St. Louis & S. F. R. Co. v. Gill (1895), 156 U. S. 649, 39 L. Ed. 567, 15 Supt. Ct. Rep. 484.) *It is an inexorable law that if more is taken out than is put in, regardless of how large the surplus, the supply will eventually be exhausted. Thus, if the utility may sell its product at a loss, then the provisions of the statute are rendered impotent, for the Commission is unable to regulate the character of service to be rendered.*" (Italics ours).

The trial court wholly ignored the purpose of the statute as declared by the Supreme Court of Montana and gave no consideration whatsoever to

the rights of the consumers to have reasonably adequate service and facilities, (Specifications Nos. 10, 11 and 12, supra, R. 29) nor to the purpose of the order in question (Specifications Nos. 4, 7, 8 and 9).

Permitting the Commission to fix *specific* just and reasonable rates, rather than mere *maximum* just and reasonable rates, is but a means to the legitimate end of requiring persons engaged in the public service to provide adequate service and facilities. And, as observed by this Court in Stephenson vs. Binford, 77 L. ed. (Dec. 6, 1932): "The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature, and not to the courts. *It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and end.*" (Italics ours).

The conception of the state's function of regulation with reference to public utilities, as outlined by the Supreme Court of Montana, is in exact accord with this Court's concept of regulation under the Commerce Clause. In Dayton-Goose Creek Ry. Co. vs. United States, 263 U. S. 456, 478, 44 S. Ct. 169, 68 L. ed. 388, it was said:

> "It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained the

> power of regulation is exhausted. This is too narrow a view of the commerce clause. *To regulate* in the sense intended *is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety* * * *" (Italics ours.)

The authority of the state to fix *precise* rates has been upheld by a number of state appellate courts.

> Coleman Gas Etc. vs. Santa Anna Co. S. W. (2d), decided Jan. 25, 1933;
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> Mapleton vs. Iowa Public Service Co. (Iowa) 223 N. W. 476;
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> Tipton vs. Tipton Light & Heating Co. (Iowa) 157 N. W. 844;
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> Pinney and Boyle Co. vs. Los Angeles, 168 Cal. 12, 141 Pac. 620;
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> Economic Gas Company vs. Los Angeles, 168 Cal. 448, 143 Pac. 717;
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> Community Natural Gas Co. vs. Natural Gas & Fuel Co. (Tex.) 34 S. W. (2d) 900;
>
> City of Farmersville vs. Texas-Louisiana Power Co. (Tex.) 55 S. W. (2d) 195.

So far as research discloses this Court has not had before it the precise question as to whether a state can fix *absolute* or *minimum* rates for public utility products or service. It has, however, upheld the right of the State to fix *minimum*

rates for *private* contract carriers operating over the public highways of the State.

Stephenson vs. Binford, supra.

In the last cited case there was challenged, *inter alia,* a provision in the Texas motor carrier statute authorizing the Railroad Commission of Texas to prescribe *minimum* rates for private contract carriers not less than those prescribed for common carriers for substantially the same service. As to this provision this Court said:

> "Undoubtedly, this interferes with the freedom of the parties to contract, but it is not such an interference as the Fourteenth Amendment forbids."

The right of a State to fix a *specific* rate or to prescribe either maximum or minimum rates for intrastate traffic has been recognized by this Court:

> Arizona Grocery Co. vs. A. T. & S. F. Ry. Co. 284 U. S. 370, 76 L. Ed.——;
>
> Minnesota Rate Case, 230 U. S. 352, 57 L. ed. 1511, 33 S. Ct. 729.

In the Arizona Grocery case, supra, this Court said:

> "The Hepburn Act and the Transportation Act evince an enlarged and different policy on the part of Congress. The first granted the Commission power to fix the maximum reasonable rate; the second extended its authority to the prescription of a named rate, or the maximum or minimum reasonable rate

or the maximum and minimum limits within which the carriers' published rate must come.

"When under this mandate the Commission declares a *specific* rate to be reasonable and lawful rate for the future it speaks as the legislature, and its pronouncement has the force of a statute. This court has repeatedly so held with respect to the fixing of *specific rates by state commissions,* and *in this respect there is no difference between authority delegated by state legislation and that conferred by Congressional action.*

"* * * The Commission, in naming the rate, speaks in its quasi-legislative capacity. *The prescription of a maximum rate, or maximum and minimum, is as legislative in quality as is the fixing of a specified rate.*" (Italics ours.)

In the Minnesota Rate Case, supra, Mr. Chief Justice Hughes used the following language concerning the Interstate Commerce Act as it then existed with relationship to its effect on intrastate commerce:

"Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates or prescribe, or authorize the commission to prescribe, *either maximum or minimum rates for intrastate traffic. It can not be supposed that Congress* sought to accomplish by indirection

that which it expressly disclaimed, or *attempted to over ride, the accustomed authority of the states* without the provision of a substitute. *On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the states and the agencies created by the states to deal with the subject.*" (Italics ours.)

SPECIFIC OR MINIMUM RATE-MAKING POWERS OF FEDERAL GOVERNMENT.

As above noted, the federal government has undertaken the exercise of *minimum* and *precise* rate powers in the Transportation Act of 1920 (49 U. S. C. A. 71 et seq.). The validity of this legislation has been conceded by the Utility (52 F. (2d) 802, 807). This concession is forced by the decisions of this Court recognizing the validity of the power conferred.

Arizona Grocery Case, supra;

Dayton-Goose Creek Ry. Co. vs. U. S. 263 U. S. 456, 44 St. Ct. 169, 68 L. ed. 388;

New England Divisions Case, 261 U. S. 184, 43 S. Ct. 470 67 L. ed. 605;

United States et al vs. Ill. Cent. R. R. Co. et al, 263 U. S. 515 44 S. Ct. 190, 68 L. ed. 417.

The Utility attempted in the trial court to justify the exercise of federal minimum rate powers with respect to commerce among the states by contending that the commerce clause of the Constitution is an express grant of power that is not limited by the Fifth Amendment. The

point was made that the power of Congress to regulate interstate commerce was granted before the Fifth Amendment was adopted and that the Fifth Amendment to no extent curtailed this power. This argument fails to recognize that the power of Congress to regulate commerce among the states is analogous to the police power of the states in regulating public utilities and that in the field of federal regulation of interstate commerce the Fifth Amendment offers the same limitations upon the federal government as does the Fourteenth Amendment upon the power of the states in regulating public utilities.

That there is no validity to the contention that because the power existed in Congress to regulate commerce among the states prior to the adoption of the Fifth Amendment, the amendment to no extent curtailed this power is manifest from the decision of this Court in Carroll v. Greenwich Insurance Co., 199 U. S. 401, 26 S. Ct. 66, 50 L. ed. 246, where it was said (199 U. S. 410):

> "It is true that, by the provision in the body of the instrument, Congress has power to regulate commerce, and that the Act of Congress referred to in the cases cited was passed in pursuance of that power. *But even if the Fifth Amendment were read as contemporaneous with the original Constitution, the power given in the commerce clause would not be taken to override it so far as the Fifth Amendment protects fundamental personal rights.*" (Italics ours.)

In United States v. C. M. St. P. & P. R. R. Co.,

282 U S. 311, 51 S. Ct. 159, 75 L. ed. 359, this Court reiterated the doctrine that (282 U. S. 327):

> "The power to regulate commerce is not absolute, but is subject to the limitations and guaranties of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty, or property without due process of law."

It being established that the Fifth Amendment offers no bar to the exercise by Congress of minimum rate powers in the regulation of commerce between the states, it follows that the Fourteenth Amendment does not forbid the states from exercising minimum rate powers with respect to intrastate public utilities.

More recently this Court has pointedly stated that the restraint imposed upon legislation by the due process clauses of the 5th and 14th Amendments is the same.

> Heiner vs. Donnan, 285 U. S. 312, 76 L. ed. 772;
>
> Coolidge vs. Long, 282 U. S. 582, 75 L. ed. 562.

In conclusion on this phase of the argument, we submit that the Supreme Court of Montana was fully justified in saying (88 Mont. 228; 293 P. 307):

> "So that it would seem that if Congress may empower the Interstate Commerce Com-

> mission to fix precise rates, without contravening the provisions of the Fifth Amendment, the state may, as to a public utility doing business wholly within the State of Montana, do likewise without violating the provisions of the Fourteenth Amendment."

The trial court in its decision upon the application for interlocutory injunction found no difficulty in upholding this view. In the majority opinion we find this statement (52 F. (2d) 802, 804):

> "It is very obvious that whatever the United States may lawfully do in respect to rates of interstate carriers, the states may do in respect to rates of intrastate utilities."

And in the concurring opinion (p. 808):

> "We believe it to be well settled, therefore, that a state or its agencies have the power to fix minimum as well as maximum rates—either specifically as to each, or by prescribing a 'precise' or 'absolute' rate."

EXCEPTION ENGRAFTED UPON STATUTE BY LOWER COURT.

(Specifications Nos. 28 and 29)

However, a majority of the lower court held in the opinion upon the application for interlocutory injunction—a view which is adopted in the opinion on final hearing (R. 23)—that:

> "This statute, like all since the classic which imposed death on any who shed blood in the streets of Verona, is presumed to intend exception to avoid absurd and unjust consequences." (52 F. (2d) 802, 805)

and that:

> "When the field is limited, at reasonable rates, that will afford fair returns to but one, and two seek to occupy it, the law of self-preservation and survival of the fittest invokes the right of competition to the last extremity; and any minimum rate and order which would prevent the struggle and condemn the rivals to the ordeal of slow starvation is unreasonable and void. In such circumstances the state must prevent competition for patronage and not merely competition in rates." (52 F. (2d) 802, 804).

The action of the majority of the court below in attempting to engraft an exception into the Montana statute, as above noted, is without warrant or precedent and violates the well established rule that a Federal court when dealing with the constitutionality of state statutes, challenged under the Fourteenth Amendment, must accept the meaning thereof as construed by the highest court of the state and is not permitted to re-examine the construction as to its propriety or accuracy.

Herbert et al. v. State of Louisiana, 272 U. S. 312, 71 L. Ed. 270; 47 S. Ct. 103;

Farncomb v. Denver, 252 U. S. 7; 40 S. Ct. 271; 64 L. Ed. 424;

Bunch v. Cole, 263 U. S. 250; 44 S. Ct. 101; 68 L. Ed. 290;

Northern Pac. Ry. Co. v. Meese, 239 U. S. 614, 60 L. Ed. 467; 36 S. Ct. 223;

Wolff Packing Co. v. Court of Industrial

Relations, 262 U. S. 522; 67 L. Ed. 1103; 43 S. Ct. 630;

Memphis & C. R. Co. v. Pace, 282 U. S. 241; 51 S. Ct. 108; 75 L. Ed. 315;

C. M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 456; 10 S. Ct. 462, 702; 33 L. Ed. 970.

The Supreme Court of Montana in the case of Great Northern Utilities Co. vs. Public Service Commission, 88 Mont. 180, 293 Pac. 294, with the same statement of facts before it as are pleaded in the complaint herein, held that the Commission had the right to fix precise rates and that the only question presented was whether such precise rates were just and reasonable, which question the Supreme Court of Montana declined to pass upon in the absence of the evidence before the Commission. The construction placed upon the state statute was made in the light of the competitive situation existing at Shelby. The alleged right of competition asserted by the Utility was considered by the Court and rejected. Witness the following excerpt from the decision (88 Mont. 230-231; 293 Pac. 308):

> "The Utility does not claim that the rates fixed by the Commission are confiscatory; nor may it be said that the Utility is denied the equal protection of the laws. The Utility contends merely for its alleged constitutional right of determining the charge to be made by it so long as that rate or charge does not exceed the maximum fixed by the Commission. The assertion of its alleged right of competition in the instant case amounts

to what? In other words, what is the end which it seeks to attain thereby? Is it not that it may carry on a rate war to a successful conclusion? Which is another way of saying that the termination of this rate war will mean the elimination of either the Utility or the Company by either the one or the other having reached the end of its resources, or that the one will be taken over or swallowed up by the successful combatant. When this battle of rates is over, the charges made by the victor may not be fixed sufficiently high so as to enable it to recoup the losses entailed by the rate war (*Public Utility Commrs. v. New York Telephone Co.*, 271 U. S. 23, 70 L. Ed. 808, 46 Sup. Ct. Rep. 363), for those rates must remain, before the rate war as well as thereafter, according to the mandate of the statute, 'just and reasonable' based upon a fair return on the investment in the property necessary to be used, and used, by the Utility in furnishing its product to the consumer. True, the public will have gained a temporary advantage through the lowering of prices, but that the same public will lose in the long run is a matter of common experience. In the *Mapleton Case*, supra, the Supreme Court of Iowa aptly says: 'A public utility, operating under a franchise, has no constitutional right of competition. Moreover, a rate war is not necessarily competition. It may be, and usually is, a mere fight, which bodes nothing to the public but disorder and disorganization.' * * * "

Had the Supreme Court of Montana construed the state statute with the exception that a majority of the lower court have tried to read into

it, it would have affirmed the judgment upon the pleadings rendered in favor of the Utility in the lower state court.

The decision of the majority of the trial court upholding the state statute and condemning the order of the Commission because the order would not permit the Utility to invoke "the right of competition to the last extremity" cannot be construed other than as an attempt to revise the decision of the Supreme Court of Montana on a question of state law. "*Whether state statutes shall be construed one way or another,*" spoke this Court in Herbert et al. v. State of Louisiana, supra, (272 U. S. 316), "*is a state question, the final decision of which rests with the courts of the state. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this Court to revise the decisions of the state courts on questions of state law.*" (Italics ours.) And in *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403, 414, 17 S. Ct. 130; 41 L. Ed. 489: "The construction so given to the statute by the highest court of the state must be accepted by this Court in judging whether the statute conforms to the Constitution of the United States."

It is obvious from the language of the majority opinion of the trial court that it did not agree with the policy the State of Montana has adopted toward public utilities of the type here involved. Says the majority (52 F. (2d) 802, 805):

"* * * The state must prevent competition

for patronage and not merely competition in rates.

"When the state launches two upon the sea of competition, and the plank of patronage will support but one, it cannot in reason deny them the right of necessity to fight to a finish for financial life, even as may two castaways at sea battle to the death for the spar which will support but one without any wrong to the survivor attaching.

"The remedy is in the state's hands, by restricting, as many states do, the number of utilities to the need of the field."

Obviously the Court was not mindful of the language employed by this Court in *Twining v. New Jersey*, when it said (211 U. S. 106, 107):

"* * * In our peculiar dual form of government nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. * * * We are not invested with the jurisdiction to pass upon the expediency, wisdom or justice of the laws of the states as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. *Under the guise of interpreting the Constitution, we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations.*" (Italics ours.)

Nor did the court give heed to the thought expressed by the Honorable Chief Justice of this Court in addressing the National Conference of Senior Circuit Justices at Asheville, N. C., in the following language:

> "We should be faithless to our supreme obligations if we interpreted the great generalities of the Constitution * * * as crystallizing our own notions of policy, our personal views of economics, and our theories of moral and social improvement."

STATUS OF RIGHT OF PUBLIC UTILITY TO ENGAGE IN BUSINESS.

The conclusion expressed by the majority of the trial court, above noted, ignores the settled proposition that engagement in the business of operating a public utility is a privilege to be exercised in virtue of a public grant or franchise; that the privilege may be granted or withheld by the state or conferred under such limitations as the state may impose, subject, of course, to the rule that a state may not impose conditions which require the relinquishment of rights guaranteed by the Federal Constitution.

New State Ice Co. vs. Liebmann, 285 U. S. 262, 76 L. Ed. 747;

Frost v. Corporation Commission of Oklahoma, 278 U. S. 515, 49 Sup. Ct. 235, 75 L. Ed. 483;

New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650; 29 L. Ed. 516; 6 S. Ct. 252;

Bank of Augusta v. Earle, 13 Pet. 519, 595; 10 L. Ed. 274, 311;

People's Pass. R. Co. v. Memphis City R. Co., 10 Wall. 38, 51; 19 L. Ed. 844, 848;

California v. Central P. R. Co., 127 U. S. 1, 40, 41; 32 L. Ed. 150, 157, 158; 8 S. Ct. 1073;

Denver v. New York Trust Co., 229 U. S. 123, 141, 142; 57 L. Ed. 1101, 1123, 1124; 33 S. Ct. 657;

Frost & T. Trucking Co. v. Railroad Commission, 271 U. S. 583, 593, et al, 70 L. Ed. 1101, 1104; 46 S. Ct. 605.

Those who devote their property to the use of the public do so subject to the right of governmental regulation in the interest of the common welfare.

State v. Florida East Coast R. Co., 69 Fla. 480, 68 S. 729.

A franchise of the character of the one here involved cannot, under Montana statutes, be granted by a city until the application for it has first been submitted to and approved by the qualified electors.

5074-5077 Revised Codes of Montana, 1921;

State ex rel. Billings v. Billings Gas Co., 55 Mont. 102, 108; 173 P. 799.

Such a franchise is not exclusive.

Great Northern Utilities Co. v. Public Service Comm., 88 Mont. 180, 218; 293 P. 294.

The franchise under which the Utility operates was accepted subject to the right of the State of Montana to regulate its operations in the interest of the public, including the right to fix precise just and reasonable rates for its product or service, and it was accepted subject to the risk that the city of Shelby might, upon application to and approval by its qualified electors, grant another or other similar franchise.

> Madera Water Works v. Madera, 228 U. S. 454; 57 L. Ed. 915; 33 S. Ct. 571;
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> Knoxville Water Co. v. Knoxville, 200 U. S. 22; 26 S. Ct. 224; 50 L. Ed. 353;
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> Hamilton Gas Light Co. v. Hamilton City, 146 U. S. 258, 13 S. Ct. 90; 36 L. Ed. 963;
>
> Piedmont Power & Light Co. v. Graham, et al., 253 U. S. 193; 64 L. Ed. 855; 40 S. Ct. 453;
>
> United Railroads of San Francisco v. San Francisco, 249 U. S. 517; 63 L. Ed. 739; 39 S. Ct. 361.

The Fourteenth Amendment does not protect against competition.

> Aetna Insurance Co. vs. Hyde, 275 U. S. 440, 447.

The State of Montana does not have the requirement found in some states that a public utility must obtain a certificate of public convenience and necessity before commencing operations, but, as above noted, it does not permit free competition. The question as to the number of public utilities of the type here involved

that may operate in a given municipality is made, by the statutes adverted to, purely a question for local determination. It might well be considered that a franchise, grantable only after approval of the qualified electors, is the substantial equivalent of a certificate of public convenience and necessity for it is not to be presumed that a municipality will approve a second franchise unless public convenience and necessity so require. The absence of a statute requiring a certificate of public convenience and necessity adds nothing to the Utility's position herein because even under a statute requiring such a certificate it is held that the rights and privileges so granted are not exclusive.

Frost vs. Corp. Comm. of Okla., supra.

ALLEGED DEFECTS COMPLAINED OF ARE CONGENITAL.
(Specifications Nos. 24, 26, 27)

The Utility having accepted its franchise in contemplation of the existing Public Service Commission Act, it is not in a position to complain of the *specific* rate powers therein granted to the Commission. If there is any defect therein, it is "a congenital defect" and as pointedly noted by this Court in *Madera Water Works v. Madera*, supra, (228 U. S. 456), "*An appeal to the Fourteenth Amendment to protect property from a congenital defect must be in vain.*" (Italics ours.) The Utility stands legally in the position of having been given express warning of what the city of Shelby might do in the matter of granting an additional franchise and of what the

Commission might do in the establishment of precise just and reasonable rates.

Manifestly, appellee has pitched its case on the theory that unless it is permitted to undersell its rival it will lose customers to its rival and thus its investment at Shelby will be impaired if not destroyed. This theory obviously is highly speculative. The complaint shows that the order of the Commission has the effect of putting the rival utilities on a rate parity, leaving them to compete on the basis of quality of service. It may be that under circumstances of equality of rates and equality of service, some or all of appellee's customers would for personal reasons transfer to its rival but such considerations cannot control the determination of the legal rights of appellee. If the Commission had authority to make the order in question the possibility, or even the probability, that its enforcement would result in appellee losing customers would not render the order violative of due process of law. The following language of this Court in Hamilton Gas Light & Coke Co. vs. City of Hamilton, supra, is directly in point:

> "It may be that the erection and maintenance of gas works by the city at public expense, and in competition with the plaintiff will ultimately impair, if not destroy, the value of the plaintiff's works for the purpose for which they were established. But such considerations cannot control the determination of the legal rights of the parties."

Our contention also finds support in the opinion

of Justice Holmes in Springfield Gas & Electric Co. vs. City of Springfield, 257 U. S. 66. In that case it appeared that a private plant was in competition with a municipal plant in the city of Springfield, Illinois. It appears that under the Illinois law the rates for privately owned utilities had to be approved by the Public Utilities Commission whereas the commission was without authority to fix rates for municipally owned plants, which latter rates were fixed by the respective city authorities. In the cited case, it appears that the rates fixed by the Public Utilities Commission were higher than those fixed by the city authorities for the competitive municipal plant. The privately owned utility sought to compel the municipally owned plant to submit to the jurisdiction of the Commission, contending that the exemption of municipally owned utilities from the rate jurisdiction of the Commission was void under the Fourteenth Amendment and that the act should be enforced as if the exemption was not there. The real complaint made was that the municipal plant was charging rates that took customers away. Justice Holmes answered this contention tersely as follows:

> "The conduct of which the plaintiff complains is not extortion, but on the contrary, charging rates that drove the plaintiff's customers away. The standard for these rates, however, according to the Supreme Court, is fixed by the Legislature. As the rates had been fixed by law at the present amounts, it would be vain to deny their validity."

In other words, Justice Holmes holds simply that if the different rates were duly fixed according to the law of the State, the fact that the private plant would lose customers to the municipal plant because this plant was permitted to charge a lower rate, would not deprive the private plant either of equal protection of the law or due process.

In a recent decision of the Texas Court of Civil Appeals, (Fifth Supreme Judicial District) City of Farmersville vs. Texas-Louisiana Power Co. et al, 55 S. W. (2d) 195, it appeared that the City of Farmersville by ordinances duly adopted, fixed rates for its own electric plant, and for a competing privately owned utility on the same basis. The private plant refused to abide by the schedule prescribed and insisted upon maintaining a schedule of rates much lower. The city brought suit to enjoin the private utility from charging rates less than those prescribed. The lower court refused the injunction finding, inter alia, that if the defendant was required to charge the same rates as the municipal plant, "that practically all of the customers of the power company would change over to the city plant and become its customers, and that the power company would not have sufficient customers or income to pay the operating expenses of their system in the city without taking into account any reserve for depreciation, and that it would result in a confiscation and loss of their properties and investments in said city." In reversing the lower court, the appellate court, with

particular reference to the finding quoted, had this to say:

> "The loss of patrons by appellee (visualized by the trial court, if compelled to charge the same rates prescribed by the municipal plant for its own observance (which, until overturned in an appropriate proceeding, are presumed reasonable, and such as appellant was compelled to impose in order to discharge its duty under Art. 1113 R. S.) is obviously based upon speculation; but even if, as assumed by the court, patrons should change from appellee to appellant as the result of competition based alone upon the quality of service rendered, which would be the case, as the record neither discloses nor is it contended that there existed any inequality in opportunity to secure business therefore loss of patronage, under these circumstances, would be simply an incident to legitimate competition, an economic loss, and in no sense a confiscation of appellee's property as that term is understood. Can it be reasonably insisted that, appellee will suffer a confiscation of property if compelled to charge rates materially higher than those being voluntarily collected by it?; its position, in effect, is that in order to prevent confiscation, under the ministry of higher rates, it was selling its service for materially less compensation. It is perfectly obvious that, if appellee is compelled to charge the rates prescribed by the ordinance, it will suffer loss only in so far as it fails to successfully compete with the municipal plant in the quality of service rendered under precisely equal conditions and opportunities.
>
> "*The law guarantees equal opportunities*

for competition, but does not and cannot guarantee economic results. This doctrine was announced by the United States Supreme Court in Aetna Insurance Co. v. Hyde, 275 U. S. 440, 48 S. Ct. R. 174, as follows: "It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business." The same idea was expressed by Judge Hutcheson in Galveston Electric Co. v. City of Galveston, 272 Fed. 147, he wrote: "Counsel on page 47 of their brief say: 'It must be borne in mind in this connection, that the Galveston Electric Company is a public service corporation, and that the Constitution guarantees it a fair return upon the value of its property.' This statement is wholly erroneous, and must have been made without thought. The Constitution makes no guarantee, to the complainant, except to protect it against legislation which would deprive the company of the right to charge rates adequate to produce a fair rate of return. If counsel's major premise that the Constitution guarantees a fixed net for return were correct, its conclusion is right, but that this proposition is unsound is manifest. Certainly the Constitution does no more than to say to the complainant that the Legislature cannot force it to operate at such rates as will deprive it of a return similar to that enjoyed generally by enterprises in that community." *If an economic disaster should overtake a public utility as the result of legitimate competition, the loss must be born as a business casualty.*" (Italics ours.)

The exact contentions made in this case by the Utility as to its alleged right of competition were made in Coleman Gas & Oil Co. vs. Santa Anna Gas Company by the Coleman Gas & Oil Co. —S. W. (2d)—decided Jan. 25, 1933, in its appeal to the Court of Civil Appeals of Texas (3rd Supreme Jud. Dist.) from a decree of the lower court enjoining it, at the instance of a competitor, from violating an ordinance of the Santa Anna City Commission fixing *specific* rates for the sale of natural gas to domestic and commercial consumers. It was there urged, as stated by the Court, "That since the field was limited, and the patronage sufficient to support only one of the two competing utilities, it had the inalienable right to engage in 'cut-throat competition', and thereby to drive its competitor from the field." This ground was predicated upon the majority holding in this case in granting the interlocutory injunction against the Montana Commission. After making references as to the majority and special concurring opinions and the order of affirmance by this Court, the Texas court observes:

> "The majority holding in the Montana case appears to be sui generia in the annals of American jurisprudence. This the opinion * * * concedes."

And, after discussion of the fundamentals involved, the court states:

> "We view the doctrine urged as dangerous, as well as novel, and are loath to give it our sanction."

The decision of the lower court was affirmed.

The holdings in the two Texas cases just adverted to follow the doctrine laid down in Community Natural Gas Company vs. Natural Gas & Fuel Company, 34 S. W. (2d) 900, a decision of the Court of Civil Appeals for the Third Supreme District, wherein it was held that where a city has granted franchises to competing corporations the city (it having the power and authority to fix rates) "is charged with the duty of fixing just and reasonable rates, both in the interest of the contending utilities and in that of the consumers" and that "the city could not make rates for one corporation which were higher or lower than the rates made for another corporation for the same services to the same patrons in the same territory that would be legally binding as fixed rates." This holding absolutely squares with the decision of the Supreme Court of Montana in Great Northern Utilities Co. vs. Public Service Commission, supra, and the policy pursued by the Montana Commission in the report and order involved therein.

In another fairly recent case (decided subsequent to the issuance of the Commission's order herein), Mapleton vs. Iowa Public Service Co. 209 Iowa 400, 223 N. W. 476, the situation presented was to all intents and purposes identical with the instant case. There the Town of Mapleton brought an action to enjoin Iowa Public Service Co., a public utility owning and operating an electric plant in the Town of Mapleton from violating an ordinance adopted by the Town of Mapleton fixing the rates to be charged for

electricity, the particular complaint being that the utility was charging a lesser rate than that fixed by the ordinance. The Town of Mapleton was also the owner and operator of an electric plant or system. The questions presented to the Supreme Court of Iowa are the same questions here presented. In upholding a decree of the lower court granting an injunction, the higher court said:

> "A public utility, operating under a franchise, has no constitutional right of competition."

It also said:

> "The owner of private property, voluntarily devoted to public use, necessarily surrenders some of his rights, and subjects himself to reasonable municipal regulation. The major right thus surrendered by him is that of fixing the price of his service or commodity. The Constitution protects him against confiscation by guaranteeing him that the price fixed by the municipality shall not be unreasonable."
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> * * *
>
> "When the owner of private property devotes it to the public use, as herein, he voluntarily retires from the field of competition, so far as the question of rates is concerned."
>
> * * *
>
> "A rate war is not necessarily competition. It may be, and usually is, a mere fight, which bodes nothing to the public but disorder and disorganization."

The court cites approvingly the case of Eco-

nomic Gas Co. vs. City of Los Angeles, 168 Cal. 448 143 Pac. 717, from which we quote the following passage:

> "It is contended that the city's police power extends only to the protection of the consumer. But 'regulation' involves more than that. It includes the power to prevent ruinous competition among the producers as well as unjust charges to the consumers."

In Idaho Power & Light Co. v. Blomquist, 26 Ida. 222, 141 P. 1083, brought to the Court's attention because the views expressed therein are in harmony with the decided cases (although it is concededly dictum), we find a statement of the decided trend in public utility regulation. We quote the following observations of the Idaho Supreme Court (141 P. 1089, 1090):

> "Under these various utility acts, the commission is generally given power to regulate rates and fix a specific rate, instead of a mere maximum, and that took away the opportunity for rate cutting, one of the principal instruments of warfare between such corporations. Under the act in question, the commission is given power to fix the rate absolutely, and neither of the competing companies can charge more or less than the rate fixed.
>
> * * *
>
> "If rates are absolutely fixed by the commission, with no permission to the utilities corporations to charge more or less, the public can receive no advantage from competition. *Experience shows that while the people, or some of the people, may receive a*

temporary advantage from cutthroat competition, the general public can receive no substantial advantage therefrom." (Italics ours.)

The authority of the Interstate Commerce Commission to prevent rate competition between competing carriers, by virtue of the minimum and precise rate powers granted by the Transportation Act of 1920, supra, has been recognized by this Court. In United States vs. Illinois Central Railroad Co. et al, supra, this Court said (263 U. S. 525):

> "For now the interests of the individual carrier must yield in many respects to the public need * * *; *and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate policies of a competitor, which were theretofore uncontrollable.*" (Italics ours.)

UTILITY IS BOUND BY EXPRESS CONTRACT TO CHARGE SPECIFIC RATES.

(Specification No. 25)

There is still a further reason, apparent upon the face of the complaint, why the Utility is not in a position to assert any alleged right of competition. In its franchise there is found this proviso (R. 11):

> "Section 3. The rates to be charged for gas of whatsoever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of Montana shall order and determine."

As above pointed out, the Board of Railroad

Commissioners of the State of Montana is ex-officio the Public Service Commission of Montana (3880 Revised Codes of Montana, 1921). The franchise granted by the city of Shelby, upon acceptance, became a binding contract between the city and the grantee.

State ex rel. Billings Gas Co. v. Billings, 55 Mont. 102, 108; 173 P. 799;

City of Helena v. Helena Light & Ry. Co., 63 Mont. 108; 207 P. 337.

Under the terms of this binding contract the grantee, and therefore the Utility as successor in interest, bound itself to charge for gas only such *precise* just and reasonable rates as the Board, ex-officio Commission, should prescribe.

CONFISCATION DUE TO INADEQUATE RATES NOT AN ISSUE.

(Specifications Nos. 21 and 22)

The bill of complaint does not present or tender any issue as to whether or not the prescribed rates afford a fair return. The allegations of the complaint make it plain that the Utility is not asserting any right to charge rates *higher* than the rates prescribed by the Commission. It is only contending for the right to charge rates *lower* than those fixed by the Commission as just and reasonable. It alleges that it has not complied with the order of the Commission and refuses to comply with it (Complaint Para. XXII. R. 7). It shows that it has filed with the Commission a tariff containing rates much lower than the prescribed rates (Complaint Para. XVIII. R. 5)

and it is the refusal of the Commission to concur in this lower tariff that is made the basis of its complaint. (Complaint Paras. XIX, XX, R. 6). It does not seek to restrain the prescribed rates as confiscatory but only seeks an injunction "enjoining and restraining said defendants from in any manner preventing or interfering with the plaintiff in charging and collecting any rates for gas, not discriminatory, *less* than the rates prescribed by said order." (Italics ours) (R. 9).

Under the theory of the complaint, the facts alleged and the relief requested, any question as to the adequacy or inadequacy of the prescribed rates is moot. Until such time as the Utility asserts the right to charge a compensatory or non-confiscatory schedule of rates, the question whether the rates will afford a fair return is purely hypothetical. On this score the complaint does not present a justiciable controversy.

After all of the evidence on final hearing had been taken before the Examiner and on the day that the special court sat to hear the case on the merits, an application to amend the complaint was made by the Utility in an attempt to present the issue of confiscation due to the prescribed rates being insufficient. (R. 21). The proposed amendment was opposed by the defendants (R. 21) and disallowed by the court (R. 23). Nevertheless the court in deciding the case treated the issue as being in the case and purports to make a finding thereon. (R. 24).

In the opinion rendered in the court below,

we find the following language with respect to this issue (R. 23):

> "If now an issue, the pleadings suffice to present it, necessarily involved in 'the question of the reasonableness, in the circumstances disclosed, of the order' in suit."

From this language it appears that the trial court held that the question was presented (1) by the pleadings and (2) by virtue of the language used by this Court in affirming the order granting an interlocutory injunction. (285 U. S. 524).

Considering, first, the pleadings, attention is respectfully directed to the fact that the complaint does not set forth the *present* fair value of the Utility's property, the expenses of operation, the revenues which would be recruited under the rates prescribed, or the rate of return which would under prevailing circumstances, be a fair rate of return. In the absence of appropriate allegations with respect to these elements—elements which control a determination as to the confiscatory character of rates—the complaint cannot, consistently with the rules of pleading approved by this Court, be held to present the issue of confiscation.

Beaumont, S. L. & W. Ry. vs. U. S., 282 U. S. 74, 88-89;

Aetna Insurance Co. vs. Hyde, 275 U. S. 440, 447;

Louisville & Nashville R. R. Co. vs. Garrett, 231 U. S. 298, 314;

Prendergast vs. N. Y. Tel. Co. 262 U. S. 43;
Equity Rule No 25, Para. 3.

As stated by this Court in Aetna Insurance Co. vs. Hyde, supra:

> "In order to invoke the constitutional protection, the facts relied on to restrain the enforcement of rates prescribed under the sanction of state law must be *specifically* set forth, and from them it must *clearly* appear that the rates would *necessarily* deny to the plaintiff just compensation and deprive it of its property without due process of law." (Italics ours.)

We need scarcely argue at this late date that the basis of all calculations as to the reasonableness of rates to be charged by a public utility is the fair value of the property at the time it is being used for the public; in other words, its present fair value.

McCardle v. Indianapolis Water Co., 272 U. S. 400; 47 S. Ct. 144; 71 L. Ed. 316;

Bluefield Water Works Co. v. Pub. Serv. Comm. 262 U. S. 679; 43 S. Ct. 675; 67 L. Ed. 1176;

New York Telephone Case, 271 U. S. 23; 46 S. Ct. 363; 70 L. Ed. 808;

Smyth v. Ames, 169 U. S. 466; 42 L. Ed. 819, 18 S. Ct. 418.

In the absence of any allegation as to present fair value, the Commission is not advised as what the claim of the Utility is in this respect,

nor is it able to take issue thereon or to prepare itself to make a showing in relation thereto. The same criticism holds good as to the element of operating expenses. In Aetna Insurance Co. vs. Hyde, supra, this Court, criticised the complaint because it failed to show that the complainants' businesses were "so well and economically organized and carried on that petitioners are entitled, as of right protected by the Constitution, to have premiums in the aggregate enough to yield a reasonable return or profit to all the companies." (275 U. S. 448). Likewise, as to operating revenues, and in this connection attention is respectfully called to this Court's criticism of the complaint in Louisville and Nashville R. R. Co. vs. Garrett because "The bill does not show * * the return which would be permitted under the rates prescribed." (231 U. S. 315). Before a rate can be condemned as being confiscatory it is necessary to make appropriate findings as to what constitutes a fair rate or return as well as to determine what is a fair allowance for depreciation.

> United Railways & Elec. Co. v. West, 280 U. S. 234; 50 S. Ct. 123; 74 L. Ed. 390;
>
> Smith v. Illinois Bell Tel. Co., 282 U. S. 133; 51 S. Ct. 65; 75 L. Ed. 255.

Nevertheless, as to these elements there are no allegations in the complaint.

The conclusion is inescapable that it was not in the mind of the plaintiff at the time the complaint was filed to attack the rates prescribed as being inadequate. Its present position is ap-

parently an afterthought suggested, perhaps, by the views of the minority of the court upon the application for interlocutory injunction. (52 F. (2d) 805) (R. 87). It will be noted that in the special concurring opinion filed in the cause after the appeal from the order allowing interlocutory injunction had been allowed, note was taken of the defendants' position that the complaint does not present the issue of confiscation but, it will also be noted, that the contention was overruled because "the complaint * * in paragraph XX, does specifically invoke the due process of law clause of the Fourteenth Amendment." Recourse to paragraph XX of the complaint discloses that the complaint therein is against the action of the Commission in increasing the lower rate schedule of the Utility and that deprivation of the alleged right of competition is the basis for the allegation of a violation of the Fourteenth Amendment. To raise the issue of confiscation it is not enough to merely allege that an order is in violation of the Fourteenth Amendment. "*Allegations asserting in general language that the findings, order and reduced rates are confiscatory and repugnant to the Fourteenth Amendment are not sufficient.*" (Italics ours.)

Aetna Ins. Co. vs. Hyde, 275 U. S. 440, 447.

In City of Farmersville vs. Texas-Louisiana Power Co., supra, where the defendant was insisting upon the right to charge rates lower than those prescribed by the City of Farmersville, the trial court, in denying the city's application for an injunction, made a finding, among others, that

the city in fixing the ordinance rate did not consider whether the rate or compensation was sufficient to yield more or less than 10% net on the actual cost of the physical properties etc. of either the city plant or the defendant company's system. In disposing of this finding as being immaterial the appellate court used the following language, which is apropos of the present contentions of the Utility herein:

> "This finding we regard immaterial, as no direct attack was made by appellee on the rates as being insufficient to yield 10% on the actual costs, etc., its insistence being that it had the right to charge rates much lower than those prescribed by the city, therefore an objection that the rates prescribed by the ordinance were too low would place appellee in such an incongruous position as to render such criticism unworthy of consideration."

ORDER AFFIRMING INTERLOCUTORY INJUNCTION DOES NOT BROADEN ISSUES NOR INTRODUCE NEW ISSUES.

On the final hearing the lower court held, as above noted, that the question of confiscation was necessarily involved by reason of this Court's order of affirmance of the interlocutory injunction granted herein which order of affirmance was "without prejudice to the consideration and determination at final hearing of all questions of law and fact, including the question of the reasonableness, in the circumstances disclosed, of the order which is the subject of the suit." (285 U. S. 524).

Bearing in mind the well established doctrine

that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised, appellants are only able to read in the order of affirmance the implied finding that the discretion of the lower court had not been abused. The Court cites as precedent for its *Per Curiam* order the case of Alabama et al vs. United States et al, 279, U. S. 229, 230-31, wherein it was said:

> "The duty of this court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused."

Under the order of affirmance *all* questions of law were left to the trial court for consideration and determination. The sufficiency of the complaint to state a cause of action in equity on any theory is one of the questions of law involved in the case. Had this Court intended to pass upon the question as to whether the complaint presented the issue of confiscation due to inadequate rates, we have the right to assume that clear and unequivocal language would have been used. Plaintiff did not so construe the order, otherwise it would not have offered the amendment that it proposed at final hearing. (R. 21, 114). Under the accepted rules of pleading the complaint does not present the issue of confiscation due to insufficient rates, as we have above shown. It is inconceivable that this Court

intended by its order of affirmance to introduce an issue into the case that is not presented by the complaint—an issue that, so long as the Utility insists upon charging less than the prescribed rate, can only be regarded as hypothetical. It will be sufficient time when the Utility is seeking to charge and collect just and reasonable rates to pass upon the adequacy of the prescribed rates. Until such time, the Utility is not in position to assert that it has been or is being injured by a schedule of rates higher than that being voluntarily charged by it.

In Coleman Gas etc. Co. vs. Santa Anna Gas Co., supra, it will be observed that the Texas Court of Civil Appeals apparently views the order of affirmance of the interlocutory injunction in this case in the same light as appellants do.

INSUFFICIENCY OF FINDINGS OF FACT AND INSUFFICIENCY OF EVIDENCE UPON WHICH TO PREDICATE REQUISITE FINDINGS.

(Specifications Nos. 13, to 20 inclusive and No. 23)

Specifications Nos 13 to 20, inclusive, and No. 23 are so inter-related that they admit of treatment under one grouping. Specification No. 23 assigns as error the failure of the lower court to find the facts *specially* and to state separately its conclusions of law thereon as required by Rule 70½ of the Equity Rules. The other specifications in this group attack the findings specifically and the sufficiency of the evidence to support same.

The record discloses that the lower court made

and filed what it designates as "Findings of Fact and Conclusions of Law" (R. 23) but it is appellants' position that these so-called findings of fact are not the appropriate findings contemplated by the Equity Rule and the decisions of this Court. The findings of fact of the lower court are four in number and are as follows:

> "1. That the gas plant and system of Citizens Gas Company at Shelby, Montana, is, substantially, a duplication of the gas plant and system of the plaintiff company.
>
> 2. That the community of Shelby, Montana, is insufficient to support and maintain, at rates affording fair return, the competing gas plants and systems therein installed and operated.
>
> 3. That the rates prescribed by the Commission for the plaintiff company deprive it of the right of competition, which right plaintiff has in the circumstances disclosed and said rates, if applied to plaintiff's operation, would destroy its property.
>
> 4. That, in any event, the rates prescribed by the defendant Commission would, if applied to plaintiff's operations, fail to produce legitimate operating expenses, taxes, depreciation and a fair return upon the fair value of plaintiff's property."

It will be noted that the findings are essentially general conclusions on matters of both law and fact. The first three findings are obviously predicated upon the Utility's theory of unlimited right of competition, whereas the

fourth appears to be drawn on the theory of confiscation arising out of the prescription of rates insufficient to produce revenues to cover operating expenses and a fair return upon the fair value of the plaintiff's property.

It having been shown above that the claim of unlimited right of competition asserted by the Utility is without foundation as a matter of law because (a) the Fourteenth Amendment does not guarantee any such right to a public utility and (b) the Utility is bound by its franchise contract to charge specific or precise rates as fixed and determined by the Commission, the findings need not be examined with reference to this phase. And, of course, if appellants' are correct in their contention that the bill of complaint does not tender the issue of confiscation due to inadequacy of the prescribed rates, the purported findings in this respect likewise call for no consideration.

However, if this Court holds that the issue of confiscation is present in the case, then it becomes necessary to examine the findings and the evidence to determine the validity of appellants' specifications addressed thereto.

If Finding No. 4 (R. 24) is construed as holding that the rates prescribed are insufficient as being too low, then it is defective under Rule 70½ of the Equity Rules and decisions of this court in that the lower court has failed to make special or appropriate basic findings as to

(a) The present fair value of the Utility's property;

McCardle vs. Indianapolis Water Co., supra;

Bluefield Water Works Co. vs. Public Service Comm. supra;

New York Telephone Case, supra.

(b) The revenues the prescribed rates would have produced or would produce;

Smith vs. Illinois Bell Telephone Co., 282 U. S. 133, 75 L. Ed. 255.

(c) The reasonable operating expenses of the Utility under efficient and economical management;

Aetna Insurance Co. vs. Hyde, supra.

(d) What constituted a fair allowance for depreciation;

United Railways etc. vs. West, 280 U. S. 234, 74 L. Ed. 390.

(e) What constituted a fair return under the circumstances.

United Railways etc. vs. West, supra.

The cases cited show the necessity of making appropriate findings on the various elements necessary to be considered in a confiscation case.

In the matter of substantive findings on confiscation, the record herein is practically as deficient as was the record in Wisconsin Railroad Commission vs. Maxey, 281 U. S. 82, 74 L. Ed. 717 wherein the cause was remanded for further findings of fact and conclusions of law.

The defects in the findings of the lower court are readily accounted for by recourse to the evidence. There was not before the court competent evidence upon which the court could make a finding as to the present fair value of the Utility's plant or system. The method employed by the Utility in Exhibit No. 5 of taking the value found by the Commission as of January 1, 1928 and adding to it the net additions between that date and July 31, 1932, as taken from the Utility's records—and without deduction for accrued depreciation—is not a proper or legal method of arriving at present fair value. It ignores the substantial changes downward that have taken place in the basic costs of material and labor between January 1, 1928 and July 31, 1932 and proceeds upon the assumption that the process of natural deterioration inherent in a plant of this type had been completely arrested. It is at variance with the principle referred to by this Court in McCardle vs. Indianapolis Water Co., supra, wherein it was said:

> "It is well established that values of utility properties fluctuate, and that owners must bear the decline and are entitled to the increase."

In Waukesha Gas & Elec. Co. vs. Railroad Comm. of Wisconsin, 211 N. W. 760, the Supreme Court of Wisconsin, interpreting the McCardle Case, supra, reversed an order of the Wisconsin Railroad Commission which assumed to establish rate base value upon the so-called split-inventory method, saying:

"A valuation which does not as to the tangible property substantially reflect the then cost of reproduction less depreciation does not meet the requirements. The utility is entitled to the present fair value of its property as a basis for rate making. Hence, where there has been a period of rising prices for many years original cost plus cost of additions do not correctly measure the present value. Such a method may form the main basis of a valuation during a period of fairly stable prices, but it does not as applied to prices from 1912 and earlier down to 1922. Since the basic result to be reached is the present and near future fair value of the property, any method that will accomplish that result is a proper method. It is doubtful if any method will accomplish such result unless it substantially reflects or agrees with present or recent reproduction cost less depreciation."

There was not before the court any evidence whatsoever as to the accrued depreciation existing in the Utility's plant at the time of the hearing. The value fixed by the Commission as of January 1, 1928, was based upon reproduction cost new less depreciation. What further depreciation actually took place in the plant in the more than four and one-half years elapsing before the date of the judicial inquiry conducted by the court below and the extent of actual depreciation that accrued in the additions to the property subsequent to January 1, 1928, are not shown in any particular in the evidence. It was not possible upon the record, for this reason,

to make any finding as to present value because the rule is well established that accrued depreciation is to be deducted from cost new in arriving at the present value of a public utility property for rate-making purposes.

McCardle vs. Indianapolis Water Co.,supra.

Knoxville vs. Knoxville Water Co., 212 U. S. 1, 10, 13, 14;

Minnesota Rates Case, 230 U. S. 352, 456-58.

Upon the evidence before it the lower court could not make any supported finding as to the revenues that would have accrued to the Utility under the prescribed rates. The Utility offered some estimates of revenue under the prescribed rates (Exhibit 5, sheet 2. R. 93 and Exhibit 6, R. 94) but these estimates were in turn based upon estimates made by the Commission in its report. It concedes that it did not apply the schedule of rates prescribed by the Commission to the actual consumption as shown by its consumers' ledgers to determine what would have been the actual experience under the rates. (R. 95). Thus, although the Utility had all the necessary data in its possession to show the actual effect of the prescribed rates, it declined to make the necessary computations for the assigned reason that "that would be a big job." (R. 95).

In Exhibit No. 5 (R. 93) the Utility set forth, among other data, a statement of "actual operating expenses from company records" for the calendar years 1929, 1930, 1931 and the first

seven months of 1932. No attempt was made to establish these expenses as normal operating expenses or to prove that these expenses were necessarily incurred in the efficient and prudent management of the Utility's enterprise. As a matter of record it appears that a part of the expenses of operation was incurred by the Utility in furnishing natural gas to its electrical department, operated as a separate unit, and that the only charge made to the electrical department was the actual cost of gas at the delivered price at the city gate. (R. 94). Furthermore, it was proven in the record through the manager of the rival gas system that the costs of operation of the so-called duplicate plant were materially less. From Exhibit No. 5, sheet 2, and the testimony of the manager of the rival utility, (R. 103-110) we have compiled the following table showing a comparison between the costs of operation of the two systems during the calendar year 1929, this year being the first full calendar year of operation of the rival company:

Comparison of Operating Expenses for the Year 1929
BETWEEN GREAT NORTHERN UTILITIES CO. AND CITIZENS GAS CO.

	Great Northern Utilities		Citizens Gas Co.		Percentage
M cubic feet of gas sold	73,160.5		76,745.8		
	(1)	Per M. C. F (2)	(3)	Per M. C. F. (4)	Column (4) is of Column (2)
Transmission and distribution	$ 2,339.76	$.0320	$ 980.24	$.0127	39.68
Commercial	3,229.60	.0442	628.72	.0081	18.32
General	8,987.64	.1228	5,637.99	.0735	59.85
Undistributed	1,166.42	.0159	382.98	.0049	25.72
Taxes	1,702.54	.0233	1,180.48	.0153	65.66
Total	$ 17,425.96	.2382	$ 8,810.41	.1145	48.06
Cost of gas	6,750.82	.0923	2,292.84	.0300	32.39
Total Expenses	$24,176.78	.3305	$11,103.25	.1445	43.41
Depreciation	(a) 3,486.10	.0476	(b) 5,426.50	.0707	148.52
Total cost of operation	$27,662.88	.3781	$16,529.75	.2152	56.91

(a) Depreciation based on allowance by Commission's Order No. 1530.

(b) Depreciation computed on basis of 12½ per cent of all tangible property (Commission rate allowed G. N. Utilities was 8% on tangible property exclusive of real estate and working capital.)

It will be noted from the comparison that during the calendar year 1929 the Utility sold approximately 49 per cent of the gas sold in Shelby as against approximately 51 per cent for its rival. Exclusive of the cost of gas and depreciation, the Utility sets forth figures indicating operating expenses of $17,425.96 or 23.82c per thousand cubic feet of gas sold as against $8,810.41 for its competitor or 11.45c per thousand cubic feet of gas sold. The Utility's cost of gas purchased is $6,750.82 as against $2,292.84, which in cost per thousand cubic feet of gas sold figures 9.23c for the Utility and 3c for its rival. The only operating expense in which the latter exceeds the former is in the annual allowance for depreciation where the Utility, basing its allowance on the 8 per cent fixed by the Commission, charged operating expenses with $3,486.10 in comparison with a charge of $5,426.40 by Citizens Gas Company, based upon 12½ per cent of the value of all tangible property. But even with this obviously excessive charge for depreciation, the Citizens Gas Company spent over 40 per cent less than the Utility in operating its system.

This vast disparity in the operating expenses of the two competing utilities, operating side by side, remains unexplained in the record. It was incumbent upon the Utility, urging confiscation, to prove that it is "well and economically organized and carried on."

Aetna Insurance Co. vs. Hyde, supra.

If we were to substitute on sheet 2 of Exhibit

5 (R. 93) the total expenses (before depreciation) of Citizens Gas Company ($11,103.25) for the comparable item as reported by the Utility ($24,176.78) instead of a deficit of $11,699.64, as shown in the last line, there would be for the year 1929 a surplus, over and above an 8 per cent return, of $1,373.89. This illustrates the essential importance of a special finding on the question of what constituted reasonable operating expenses under efficient and economical management.

In the matter of the annual allowance for depreciation the Utility's exhibits are constructed on the basis of the 8 per cent allowance fixed by the Commission. If the assumption is indulged in that the percentage fixed as of January 1, 1928, by the Commission was a fair allowance at the time, it does not hold good that the same percentage would be a fair allowance in 1932. The experience of the Utility in the meantime would have an important bearing on the question because in this respect "past experience is an indication of the company's requirement for the future" and if experience shows that the allowance is excessive there is no legal compulsion to allow similar accumulations to go on.

Smith vs. Illinois Bell Telephone Co., supra.

Furthermore, the allowance for annual depreciation must be based upon present value.

United Railways etc. vs. West, supra.

And, obviously, in the absence of a determina-

tion of present value, a proper allowance for depreciation cannot be made.

The Utility also, in its exhibits and testimony, proceeds upon the assumption that the rate of return fixed by the Commission at 8 per cent as of the time of its valuation, is presently a fair rate of return. The lower court made no finding as to what constituted a fair rate of return. While the court in its opinion and findings makes repeated reference to "fair return" it nowhere states what it considers or finds to be a fair rate of return under the circumstances of this case. The approved rule is that "The court in the discharge of its constitutional duty on the issue of confiscation *must* determine the amount to the best of its ability in the exercise of a fair, enlightened, and 'independent judgment as to both law and facts" (Italics ours.)

United Railways etc. vs. West, supra;

Smith vs. Illinois Bell Tel. Co., supra;

Wabash Valley Elec. Co. vs. Public Service Commission of Indiana, ... U. S., ..., 77 L. Ed....., Jan. 10, 1933.

THE PRESCRIBED RATES ARE JUST AND REASONABLE AND NON-CONFISCATORY.

Finding No 2 (R. 24) "That the community of Shelby, Montana, is insufficient to support and maintain, at rates affording fair return, the competing gas plants and systems therein installed and operated" was doubtless intended by the lower court as one of the findings necessary to support its conclusion that the Utility

has the right of competition "in the circumstances disclosed." While the finding is deficient in its statement of facts underlying the conclusion reached, nevertheless, because of the possibility that it might be construed as a finding bearing on the "question of the reasonableness, in the circumstances disclosed, of the order which is the subject of the suit" (285 U. S. 524) appellants deem it proper to discuss the sufficiency of the field in connection with the question of the reasonableness of the rates prescribed.

The extent of the field at Shelby is to be measured obviously by the normal requirements of the community for natural gas as evidenced by the experience of the utilities. With that thought in mind appellants have prepared the following table from the record indicating the number of customers attached to each system as of December 31st of the years 1927 to 1931, inclusive, and as of July 31st, 1932, the number of cubic feet of gas sold during each of said period and the average annual consumption per customer:

COMPARISON OF NUMBER OF CUSTOMERS, VOLUME OF GAS SOLD AND AVERAGE PER CAPITA CONSUMPTION.

Number of Customers attached to each system as of December 31st of each year shown, except 1932 where figures are for first seven months.

	1927	1928	1929	1930	1931	1932 (1st 7 mos.)
Gt. Northern U.	485	454	344	337	371	363
Citizens Gas Co.		187	213	251	244	269
Total		641	557	588	615	632
Aggregate increase over 1927		156	72	123	130	147

M. cubic feet of gas sold by each utility

Gt. Northern U.	129,434	106,704	73,160	67,375	55,869	39,559
Citizens Gas Co.		12,884	76,745	76,649	76,749	67,599
Total		119,588	149,905	144,024	132,618	107,158

Average annual consumption per customer in M. cubic feet

Gt. Northern U.	266.8	235	212.6	189	150.5	108.9
Citizens Gas Co.			360.3	305.3	314.5	251.2

NOTE: Basic data for Gt. Northern U. taken from Exhibit No. 3; (R. 98a) for Citizens Gas from testimony of Witness Tillman (R. 103); annual consumption per consumer arrived at by dividing total sales for the year by number of customers as of December 31st of each year shown, except for 1932 where the average is for the first seven months.

From the above table it will be noted that the advent into the gas field at Shelby of Citizens Gas Co. was the occasion for an increase in the number of gas users as well as in the volume of consumption. Within three months after Citizens Gas Co. commenced operations, that is, as of December 31, 1928, the total number of gas consumers in Shelby had increased from 485 (the number of customers had by the Utility before its rival commenced operation (R. 5, 91) to 641 or a percentage increase of slightly in excess of 32 per cent. In September, 1932, the total number of consumers attached to both systems was 632, only 9 less than as of December 31, 1928.

The first full calendar year of competition (1929) witnessed an increase of over 30,000,000 cubic feet in the volume of gas sold in Shelby over the preceding year, or an increase of more than 25 per cent notwithstanding a reduction of 98 in the number of customers attached to both systems. Came the economic depression and a slump in the volume of sales. In 1930, despite a net gain of 51 customers, the aggregate volume of gas sales declined about 6,000,000 cubic feet. 1931 saw a net increase of 7 customers but a further reduction of volume of sales, the loss, as compared with 1929 sales, being in excess of 17,000,000 cubic feet. The falling off in volume was due, apparently, to a reduction in the per capita consumption rather than to the decrease in the number of customers. For illustration, the average annual consumption per customer of the Utility in 1927 was 266,800 cubic feet as against

150,500 in 1931, or a reduction of about 43 per cent. In the case of its rival, which showed an average annual consumption per customer of 360,300 cubic feet in 1929, the figure for 1931 was 314,500, or a falling off in excess of 12½ per cent. Notwithstanding the fact that the Utility increased its number of customers from 344 at the end of 1929 to 371 at the end of 1931, its volume of sales dropped from 73,160,000 to 55,869,000 or a decrease in excess of 23 per cent. On the other hand, although the rival company increased the number of its customers from 213 as of December 31, 1929, to 244 as of the same date in 1931, its increase in the volume of its sales was less than 5,000 cubic feet. However, figures for the first seven months of 1932, showing a total consumption for the two systems of 107,158,000 cubic feet indicate a decided trend upward in volume of sales. The average monthly consumption for these 7 months is in excess of 15,000,000 cubic feet per month, which if maintained for the balance of the year would produce a volume of sales substantially in excess of the year 1929 when the combined sales were 149,905,000 cubic feet. Under the circumstances it is reasonable to assume that the community of Shelby normally offers a field for the sale of 150,000,000 cubic feet of natural gas per year.

Whether or not annual sales of 150,000,000 cubic feet are sufficient to support two plants under the prescribed rates depends upon the amount of revenue that would be produced under the rates, the reasonable operating expenses, in-

cluding a fair allowance for depreciation, the value of the property, used and useful for the convenience of the public and a fair return under the circumstances. While, as we have above pointed out, there is not legal and competent evidence in the record upon which to base positive findings upon certain of these factors, there is sufficient data upon which to establish a prima facie case that the field at Shelby is sufficient under the prescribed rates to afford a fair return to both companies.

REVENUES UNDER THE PRESCRIBED RATES.

It was the estimate of the Commission that the prescribed rates would yield an average revenue of 27.13c per thousand cubic feet of gas sold. (R. 76). Patently this was a prediction. The only evidence that appears in this record which tests out the accuracy of the Commission's prediction relates to the actual experience of the rival utility during the calendar year 1929 when it actually operated under a schedule of rates identical with the rates prescribed by the Commission for the Utility. During that year Citizens Gas Co. sold 76,745,800 cubic feet of natural gas for which it received $21,675.24 in gross operating revenues ($5,145.49 net operating revenues after payment of operating expenses of $16,529.75 R. 109) which fixes the average revenue received per thousand cubic feet at 28.24c. The Utility during 1929 was charging its schedule 4-A so it affords no experience basis. Nor did it apply the prescribed schedule to its actual sales in order to arrive at what its probable revenues would have been (R. 95).

Taking the actual experience of Citizens Gas Co. as to average revenue received per M cubic feet of gas sold (28.24c) and applying it to the estimated normal annual volume of sales (150,000,000 cubic feet) there is produced operating revenues of $42,360.00. This figure may be compared with the aggregate total revenues of $21,675.24 (actual) for Citizens Gas Co. and $19,752.34 (estimated) for the Utility, amounting to $41,427.58 for aggregate sales of 149,905,000 cubic feet during the year 1929.

REASONABLE OPERATING EXPENSES.

We have heretofore noted the great disparity that exists between the operating expenses of the Utility and its rival during the year 1929 and subsequent periods. Taking 1929, for illustration, the Utility sets up as "actual operating expenses from company records" total operating expenses (before depreciation) of $24,176.78 which is to be compared with the actual operating expenses of its rival (before depreciation) of $11,103.25. Having in mind that the rival utility was operating a duplicate plant, but recently established, under a schedule of rates considerably higher than that charged by the Utility, which circumstances make for higher initial operating costs because of the necessary promotion work to be carried on, it would appear entirely justifiable to accept as a normal level the experience of the Citizens Gas Co., particularly in view of the fact that Citizens Gas Company was able to reduce its operating expenses (excluding cost of gas purchased and depreciation) for 1930 and

1931 below the expenditure for 1929. In 1930, Citizens Gas Company's operating expenses (exclusive of cost of gas purchased and depreciation) were $4,168.54 as compared with $15,564.80 for Great Northern Utilities Co. (R. 93) and in 1931 they were $6,433.49 as compared with $14,072.06 for the Utility (R. 93). The figures for Citizens Gas Company are computed from its manager's testimony on direct (R. 103) and redirect (R. 109), it appearing that in stating these expenses on direct examination there was included as operating expenses improper items (R. 109).

Excluding for the time being the allowance for depreciation, the expense of operating the Citizens Gas plant for 1929 (including cost of gas purchased) figures 14.45c per thousand cubic feet of gas sold. The comparable figure for Great Northern Utilities Company is 33.05c. These figures are based upon gross sales of 76,745,800 and 73,160,500 cubic feet of gas respectively. The operating expenses per thousand cubic feet of gas sold varies with consumption. It is generally true that with increased sales the costs per thousand cubic feet are smaller (R. 95).

The difference between the amount charged to operations for depreciation by the Utility and its rival has been accounted for above by the explanation that in the case of the Utility it used the percentage fixed by the Commission in its order, namely 8 per cent, whereas the Citizens Gas Company employed a flat 12½ per cent on all tangible property. Readjusting the latter (for 1929) on the basis of an 8 per cent allowance,

which is patently a high allowance, it would reduce the charge made by Citizens Gas Company to $3,472.96.

Taking, again, the actual experience of Citizens Gas Company as to the average cost of operations per M. cubic feet of gas sold, exclusive of depreciation, (14.45c) and applying it to the estimated normal annual volume of sales (150,000,000 cubic feet) there is produced operating expenses of $21,875.00. Add to this sum the amount of the annual allowance for depreciation shown on the Utility's Exhibit No. 5, sheet 2 (R. 93) $3,486.10, plus the adjusted depreciation allowance for its rival, $3,472.96, and we arrive at a grant total of $28,834.06, representing, in the light of the record, the reasonable annual cost of selling and distributing 150,000,000 cubic feet of natural gas at Shelby.

NET OPERATING REVENUE AVAILABLE FOR RETURN.

Predicated upon the above estimates of operating revenues and expenses there would be available for return upon the value of the property, used and useful, in the natural gas service at Shelby the difference between $42,360.00 (operating revenue) and $28,834.06 (operating expense) or $13,525.94.

RATE OF RETURN—AGGREGATE RATE BASE.

Proceeding upon the assumption indulged in by the Utility that 8 per cent constitutes a fair return, it will be observed that the sum of $13,525.94, constructive net operating revenue shown

above, is the equivalent of an 8 per cent return upon property of the value of $169,074.25.

While there is not competent evidence in the record upon which to predicate an absolute finding as to the aggregate present fair value of the two plants or systems, there is sufficient evidence from which an approximate idea of the claimed values of the respective plants can be obtained. The Utility sets forth in Exhibit 5, sheet 1, (R. 92) the value placed on the property by the Commission as of January 1, 1928 and by adding net additions from year to year (without deduction for accrued depreciation) it shows in the final column, as of July 31, 1932, a value of $48,256.13. Citizens Gas Company, on the other hand, states that its investment in plant and equipment is "about $46,000.00." (R. 106). Taking the amount deducted in 1929 by Citizens Gas Company for depreciation, namely $5,426.50, which was computed on the basis of 12½ per cent of all tangible property, it would appear that the value of the physical property upon which the depreciation allowance was computed was $43,412.00. Making due allowance for working capital (fixed at $2,500.00 for the Utility (R. 62) and other intangibles, it is reasonably clear that the indicated value does not exceed $50,000.00, so that roughly, so far the evidence discloses, the aggregate value of the two plants is around $100,000.00.

It therefore appears from the above calculations, which we submit are justifiably made, that the community of Shelby is sufficient to support and maintain, at the prescribed rates, the competing gas plants and systems, that is to say,

there is sufficient volume of business at Shelby to yield, under the prescribed rates, revenues ample to pay all *reasonable* operating expenses, including taxes and a fair allowance for depreciation, and to afford a fair rate of return upon the aggregate value of the property (both systems) devoted to the public service.

THE EXPERIENCE OF THE RIVAL UTILITY.

Contrasting the estimated deficit of $11,699.64, under the Commission's rates, as set up by the Utility on Exhibit 5, sheet 2 (R. 93) with the actual experience of its competitor for the same year (1929) it will be observed that Citizens Gas Company, operating a duplicate plant, with substantially the same volume of business as the Utility and charging a schedule of rates identical with that prescribed for the Utility, showed a net operating revenue of $5,145.49 (R. 109), which is the equivalent of a rate of return of 8 per cent upon a rate base of $64,318.62, which is 35 per cent greater than the synthetic rate base employed by the Utility in Exhibit 5, sheet 1 (R. 92). The net operating revenue of $5,145.49 would be further increased $1,953.54 if the charge for depreciation were adjusted from a 12½ per cent basis to an 8 per cent basis, thus making an adjusted net operating revenue of $7,380.04 or an 8 per cent return on a capitalization of $92,250.05.

This actual experience of the rival company, showing its ability to earn more than a fair rate of return under a schedule of rates identical with that prescribed in the order under attack,

when selling but approximately 51 per cent of the volume of gas sold in Shelby, fairly well illustrates that the rates of the Commission are reasonable and non-confiscatory under prudent and economical management. In January, 1930 Citizens Gas Company put into effect, without Commission approval, a base rate of 20c per M. cubic feet net (its present rate) so that its experience under the 35c base rate schedule is limited to the calendar year 1929. However, the record discloses, as set forth in the table on page 91 supra, that its volume of gas sales has remained fairly constant, and, thus, it is fair to conclude that its operations would have been amply remunerative had it not been forced by the lower rate of the Utility to depart from the 1929 level. It is noteworthy that even under the 20c base rate, Citizens Gas Company showed a net operating revenue in 1930 and 1931 (R. 110).

EXPERIENCE OF THE UTILITY.

The table set forth above on page 91 discloses that while Citizens Gas Company has been able to maintain a fairly consistent volume of gas sales, the Utility has shown a decline, its sales for1931 being approximately 56,000,000 cubic feet as against 73,160,000 in 1929, the first full calendar year of competition. However, it is to be noted in connection with the Utility's gas sales that it has increased about 45 per cent the volume of gas transferred to its electrical department. This business, we have pointed out above, is handled by the gas department of the Utility without remuneration. The only charge made

against the electrical department is the price paid the pipe line company at the city gate (R. 94).

In the matter of the number of customers, it appears that as of December 31, 1931, the Utility had 371 consumers attached to its system, this number being 114 less than the number had by the Utility prior to competition. This represents a numerical loss of 23½ per cent. However, the loss in volume of sales comparing 1931 with 1927 (last full calendar year of operation before competition) is in excess of 56 per cent. Sales for the first 7 months of 1932 would indicate that the volume of business (exclusive of transfers to the electrical department) for 1932 would approximate that of 1931.

Commencing with the year 1929 the Utility claims to have sustained losses ranging from $6,429.46 in 1930 to $8,526.13 in 1929. The first seven months of 1932, it asserts, shows a loss of practically $6,300.00. (Exhibit 3, R. 90a). All of these claimed losses are predicated upon the revenues received under the 20c base rate (R. 91) and the present flat 15c rate (R. 91). They are likwise predicated upon alleged operating expenses that are approximately 100 per cent greater than the operating expenses of the rival company. Exhibit 5 (R. 92-3) attempts to show what the deficit would have been had the Utility charged the prescribed rates. We have demonstrated, however, (supra p. 87, 88) that for the year 1929, when the division of business between the competing companies was about equal, had the Utility's operating expenses fairly approximated the operating expenses of its rival, it

would have earned the prescribed rates, more than a fair return.

ABILITY OF UTILITY TO EARN A FAIR RETURN UNDER PRESCRIBED RATES WITH PRESENT VOLUME OF BUSINESS.

Whether or not the prescribed rates would yield, on the basis of the present volume of sales of the Utility (proper remuneration being exacted from the electrical department for gas transferred to it), revenues sufficient, after payment of proper and reasonable operating expenses, to return a fair return may be a matter of doubt but it is not here material. It is fairly apparent from the experience of the Citizens Gas Company during the year 1929 that the Commission's rates would have yielded upon the aggregate volume of gas sold by both companies, revenues sufficient to defray all necessary operating expenses of both companies, under reasonable and prudent management, and afford a fair return upon the aggregate value of both plants or systems. Aggregate revenues being sufficient to provide a fair return upon aggregate value of property devoted to the public service, failure of one or the other utility to earn a fair return because of its inability to acquire its share of the patronage does not involve any violation of the Fourteenth Amendment. This was made clear by this Court in Aetna Insurance Co. vs. Hyde, supra, where it was said:

> "The Fourteenth Amendment does not protect against competition. Moreover 'aggregate collections' sufficient to yield a rea-

> sonable profit for all do not necessarily give to each just compensation * * *. It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a proper profit or just compensation to all companies that happen to be engaged in the affected business."

The inability of the Utility to secure a greater share of the available business at Shelby is neither alleged nor proven to be due to any inequality in opportunity to secure business. Doubtless the purpose of the Utility in calling the manager of the rival utility as a witness and eliciting data with reference to the ownership of the stock of the Citizens Gas Company and the identity and residence of its officers and directors (R. 99) was to lay the foundation for the argument that because of local ownership of the competing utility it was in a more favorable position to attach and hold business as against the Utility with its outside ownership. However, the evidence shows that the rival utility was financed by Minneapolis, Minnesota, capital and was owned by such interests until the spring of 1931 when some 43 local residents of Shelby undertook to purchase the stock, common and preferred, from the Minneapolis holders, executing mortgage bonds upon the plant or system to secure the purchase price. (R. 102). During the period between October, 1928 and April 1931, there existed no local ownership, nevertheless the Utility lost some of its business to its competitor.

As to what specific changes in patronage from one company to the other have taken place since April 1931 the record is silent. As a matter of fact the record shows that at the end of 1931 the Utility had increased its number of customers over December 31, 1930 by 34 (R. 90a) whereas its rival showed a net loss of 7 customers during the same period. (R. 104).

In any event, transfer of patronage for sentimental or other reasons personal to the consumer is not a matter of consequence in this proceeding. Loss of patronage under such circumstances would be one of the ordinary risks of enterprise. The state is not compelled by the Constitution to guarantee economic results. The law guarantees only equal opportunities for competition.

Aetna Insurance Co. vs. Hyde, supra;

Galveston Electric Co. vs. City of Galveston, 272 Fed. 147;

City of Farmersville vs. Texas-Louisiana Power Co., supra;

Coleman Oil & Gas Co. vs. Santa Anna Gas Company, supra.

In City of Farmersville vs. Texas-Louisiana Power Co., supra, where the competitive situation existed between a municipally owned utility and a privately owned utility, the contention was made by the latter that if it was compelled to charge the same rates as the municipal plant it would lose practically all of its customers to the city-owned plant and the lower court made a finding to that effect. On appeal, in revers-

ing the lower court, the Texas Court of Civil Appeals said:

> "But even if * * * patrons should change from appellee to appellant as the result of competition based alone upon the quality of service rendered, which would be the case, as the record neither discloses nor is it contended that there existed any inequality in opportunity to secure business, therefor loss of patronage, under these circumstances, would be simply an incident to legitimate competition, an economic loss, and in no sense a confiscation of appellee's property as that term is understood.
>
> * * *
>
> "The law guarantees equal opportunities for competition but does not and cannot guarantee economic results. * * * If an economic disaster should overtake a public utility as a result of legitimate competition, the loss must be borne as a business casualty."

In Coleman Oil & Gas Company vs. Santa Anna Gas Company, decided January 25, 1933, a decision of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, the contention of the appellant—it being the utility desirous of charging less than the ordinance rates—was "that due to the stated local prejudice, it cannot compete with appellee under uniform rates, since thereunder appellee will get all or the bulk of the patronage, and thereby render appellant's investment worthless." After stating the contention as noted, Chief Justice McClendon disposed of it adversely in the following language:

"Under this situation appellant claims the right of self preservation by means of 'cut-throat competition.' Its survival, under such procedure, would manifestly depend upon its greater financial ability to 'take punishment.' But what if the tables were turned and it were a comparatively weak local concern, and its newly arrived competitor were a powerful inter-city concern? Would the same right be accorded the latter to drive appellant from the field and thereby destroy its property, because there was not sufficient patronage to support both? We are dealing, of course, with public utilities, whose property is affected with a public interest, and not with a mere private business. But even as to private individuals the right to compete for the sole purpose of acquiring a monopoly through destruction of a rival is denounced both by statute and by oft repeated judicial decision. The rule, as to public utilities, is that the governing body has the right to make uniform fixed rates applicable to all alike, not simply maximum rates. This necessarily denies the right of competition as regards rates; which is generally conceded to be advantageous to the public as a preventative of that destructive competition which produces monoply, and confines competition to the realm of service. This principle is applied by the Interstate Commerce Commission, and railroad and public service commissions through the country. Its validity can not now be brought in question.

"But, contends appellant, this general right of the city to inhibit destructive competition must give way to the right of self-preservation where conditions are such that

only one utility can survive. In other words the situation presented is one of natural or essential monoply with the consequently inherent right to protection therein. If it be conceded that this right to monoply exists, then it would seem to follow that the protection afforded should be just and adequate, through limiting the field to a single utility. Otherwise the weaker would in the smaller communities become the easy prey of the stronger. If monoply is essential in such cases, then it should be one created and protected by constituted authority, and not by financial power through the process of ruthless, destructive competition."

ALLEGED ADMISSIONS OR CONCESSIONS OF APPELLANTS ON ISSUE OF CONFISCATION.

In the opinion of the lower court we find the following language relative to the Utility's proposed amendment to the bill of complaint (R. 23):

"It may be observed that plaintiff's proposed amendment to its complaint in substance that the Commission's rates will not afford fair return and are confiscatory, opposed by defendants, is unnecessary and disallowed. *The fact was recognized by defendants from the beginning, they declared it in their report of which the order is a part, and conceded it throughout* save in so far as by belated and strategic answer uselessly compelling this second final hearing, they deny the knowledge of insufficiency of the field which their report discloses they in fact had. *If* now an issue, the pleadings suffice to present it, necessarily involved in 'the question of the reasonableness, in the circum-

stances disclosed, of the order' in suit." (Italics ours).

Respectfully but firmly appellants deny that they at any time recognized, declared or conceded that the rates prescribed were confiscatory and we challenged counsel for appellee to point out to this Court any portion or portions of the record that will support the language employed by the lower court.

The reference to the Commission's report is doubtless the same reference alluded to in the special concurring opinion filed in this cause upon the disposition of the application for interlocutory injunction. It was there said (52 F. (2d) 810):

> "We come now to the final question: did the Commission's order in the instant case give the plaintiff company 'a fair return upon a fair value' of its property?
>
> "We need not search far for an answer. It is lodged in the "Report and Order" of the Commission, which is attached to, and, by Paragraph XIX, is made part of the bill of complaint."

"On page 24 of the report we find the following language:

> 'Were we to attempt to apply the principle of a fair return upon a fair value in this case, we would arrive at a manifestly exhorbitant rate.'
>
> "In view of this and similar language found in it, the order of the Commission stands self-condemned as violative of the Four-

teenth Amendment of the Constitution of the United States. The Commission utters a strange paradox when it says, all in the same breath, that a 'fair' rate will be 'exorbitant'!"

Because of the erroneous construction and interpretation that has been placed upon the Commission's report appellants feel justified in making full reference thereto in order that the full and correct import of the language used may be correctly understood. However, before proceeding to discuss the report, we desire to make our position clear with reference to the prescribed rates: *If the issue of confiscation, as the term is understood in rate cases, is properly before this Court, that issue is to be determined upon a consideration of the "actual effects" of the prescribed rates "in the light of the utility's situation, its requirements, and opportunities" and not upon any prediction, surmise or conclusion made, entertained or expressed prior to the effective period of the rates.*

Smith vs. Illinois Bell Telephone Co., supra.

In other words, we believe the position to be well founded that if, when tested by the record before the court, the rates under attack are not shown to be confiscatory, it is wholly immaterial to the issue what formulas may have been employed by the regulatory body in arriving at the rates.

United Fuel Co. vs. Railroad Commission, 278 U. S. 300, 310 73 L. Ed. 390.

In the report of the Commission it is stated (R. 70):

> "It has been the practice of this Commission in the past in cases involving the establishment of rates for utilities engaged in rendering the same character of service in the same locality to determine a just and reasonable rate for application in the particular locality and require both utilities to serve at that rate. (Public Service Commission vs. Blue Flame Gas Company, 19 M. U. R.....; P. U. R. 1926-D 777). This same view has been expressed by other public utility commissions (Re: Los Angeles Gas and Electric Corp., P. U. R. 1927-C 545; Re: Southern California Gas Company, P. U. R. 1919-D, 155, P. U. R. 1918-A, 604; Re: Street Railway Rates (D. C.) P. U. R. 1921-E, 13; Pacific Gas and Electric Co. vs. Great Western Power Co., 1 Cal. R. C. R. 203)."

Then, after considering definitions and authorities with reference to the character of just and reasonable rates, the Commission says (R. 74):

> "The above quoted definitions and the authorities generally recognize the rule that a public service company furnishing natural gas (or other product or service) to the public is entitled to a fair rate upon the present fair value of its property used and useful in the public service, to be ascertained at the time the service is rendered. They also recognize the limitation upon this rule, namely, that a utility will never be permitted to charge more than the worth or value of the service which it is rendering. (Elkins

vs. Public Service Commission (W. Va.) 135 S. E. 397; Alexandria & W. Ry. Co. vs. Railroad Commission (La.) 79 So. 863; Smythe vs. Ames, 169 U. S. 466; San Diego Land and Town Co. vs. National City, 174 U. S. 739; Covington and Lexington Turnpike Road Co. vs. Sanford, 164 U. S. 578; Darnell vs. Edwards, U. S. 564; Simpson vs. Shephard, 230 U. S. 352; Guiding Principles of Public Service Regulation, by Spurr, Vol. 3, p. 528; Groninger on Public Utility Rate Making, 145; Valuation of Public Service Corporations by Whitten (as revised by Wilcox) Sec. 872). Were we to attempt to apply the principle of a fair return upon a fair value in this case, we would arrive at a manifestly exorbitant rate. The duplication of plants at Shelby has increased the capital investment in property devoted to the public service but it has not increased one whit the value or worth of service to the consumer. To the extent that the existence of the two systems has resulted in the employment of property in the public service in excess of that reasonably required in the public service, it presents a case similar to one of overinvestment by a public utility, where it is rightfully recognized that the burden of overinvestment must not be shifted onto the shoulders of the consumers. Unrestricted competition tends to temporarily depress rates below the plane of reasonableness. Under free competition utilities feel compelled to accept business which pays for the direct cost and very little more. On account of the difficulty of estimating even the direct cost they sometimes accept business at prices returning less than the direct cost. Under a system of regulated competition the self-de-

> structive nature of free competition is eliminated. Competition becomes a matter of furnishing better or more attractive service by the respective competitors rather than the sale of products or service at lower prices. The reasonableness of the rate charged for service is or should be based primarily upon its inherent reasonableness to the consumer. It is inevitable that two companies serving a territory that legitimately offers but enough business for one of the companies to operate on at a fair profit will have to respectively accept a return that will be less than a fair return under ordinary conditions. The rate or rates permitted to be charged must, in our judgment, reflect the fair cost of serving the consumer plus a fair allowance for return."

It is perfectly obvious from the excerpt that the Commission recognized the "fair return upon fair value" rule but was of the opinion that under the facts before it, having a due regard for the consumers, it was also bound to recognize in the fixing of rates the "worth or value of the service" factor. The right of a regulatory body to consider the value of the service to the user in establishing rates finds ample support in the authorities cited by the Commission in support of its statement of the limitation upon the "fair return upon fair value" rule. In Covington etc. Turnpike Road Co. vs. Sanford, 164 U. S. 578, cited by the Commission, the following language was used by this Court (p. 597):

> "It is alleged here that the rates prescribed are unreasonable and unjust to the company

> and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishment of new lines of transportation should cause a dimunition of the number of those who need to use a turnpike road, and, consequently, a dimunition in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use the property."

In San Diego Land & Town Co. vs. National City, 174 U. S. 739, also cited by the Commission, this Court said (quoting from Smyth vs. Ames):

> "But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public *or the fair value of the services rendered.*" (Italics ours).

And further the Court said:

> "The basis of calculations suggested by the appellant is, however, defective in not requiring the real value of the property *and the fair value in themselves of the services rendered to be taken into consideration.*" (Italics ours).

A fair statement of the rule is to be found in Corpus Juris (Vol. 10, p. 418) as follows:

> "The public is entitled to demand that no more shall be exacted from it than the serv-

> ices rendered are reasonably worth, and this right takes precedence even over the right of the carrier to a fair return on its investment when the two rights can not stand together. In consequence, *the value of the service to the public is an important factor in determining the reasonableness of the rates charged therefor.*" (Italics ours).

It is manifestly unfair and unwarranted for the lower court to attempt to squeeze out of the language of the Commission's order, employed as above noted, a declaration or concession that it was prescribing confiscatory rates or that "the fair return" rule was "consciously and deliberately disregarded by the Commission" (52 F. (2d) 811).

Far from declaring or conceding that the rates were unreasonable or unjust or confiscatory, the Commission said in the concluding portion of its report (R. 77):

> "This schedule of rates is in our judgment a schedule of just and reasonable rates. What rate of return such a schedule will yield under the competitive conditions now existing at Shelby will depend largely upon the ability of the management to attach new customers, increase consumption among present consumers and to effect such economies in operation as are consistent with adequate service."

SPECIFICATIONS OF ERRORS NOS. 30 TO 39, INCLUSIVE.

Specifications of Errors Nos. 30 to 38, inclusive (Assignments of Errors Nos. XXX to XXXVIII, R. 34-40) all relate to the reception in

evidence over defendants' objections (R. 43) of testimony and exhibits offered by the Utility for the purpose of showing that the prescribed rates are confiscatory. Specification No. 39 (Assignment No. XXXIX, R. 40) assigns as error the refusal of the court to sustain defendants' motion to strike from the record the testimony and exhibits to which objections were made. (R. 102). Exceptions were granted defendants to the court's rulings. (R. 22).

In the forepart of this Brief we have discussed the question as to whether the bill of complaint tenders the issue of confiscation due to insufficient rates. (Brief, pps. 70-78). The specifications under consideration are all concerned with that same question—the objections to the testimony and exhibits and the motion to strike same being based upon the premise that the issue of confiscation is not tendered. Inasmuch as their validity must stand or fall upon the determination by this Court upon the scope of the complaint, we, therefore, submit these specifications upon the argument heretofore made on this phase.

ALLEGED UNCONSTITUTIONALITY OF SECTIONS 3906 AND 3908 REVISED CODES OF MONTANA, 1921.

The bill of complaint alleges in very general language that sections 3906 and 3908 of the Revised Codes of Montana, 1921, are unconstitutional in certain respects. (R. 7, 8). The lower court makes no finding or reference to these contentions. It is clear that the record does not

present any question as to the constitutionality of either section.

So far as section 3906 is concerned, there is no evidence to show that the Utility made an application to the State courts for an order staying the Commission Report and Order; thus, the Utility is not in the position to raise the question.

> Investors Syndicate vs. Porter et al, 286 U. S. 461, 76 L. Ed. 1226.

Nor will this Court decide the question of the constitutionality of a statute unless the decision of such question is necessary to the disposition of the case.

> Ohio River Co. vs. Dittey, 232 U. S. 576;
>
> Light vs. U. S. 220 U. S. 523.

It was stipulated in the record that either the State of Montana, acting as the State or through any of its political subdivisions, has attempted to subject the Utility to the penalty prescribed by sections 3908 and 3888, Revised Codes of Montana, 1921. Under these circumstances this Court is not called upon to give any opinion in respect to the alleged unconstitutionality of Section 3908.

> Champlain Refining Co. vs. Corporation Commission, 286 U. S. 210 76 L. Ed. 1062;
>
> Grenada Lumber Co. vs. Mississippi, 217 U. S. 433, 443.

CONCLUSION

For the reasons above noted, the decree of the lower court granting a permanent injunction should be reversed and the case remanded with directions to dismiss the bill of complaint.

Respectfully submitted,

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APPENDIX

The particular sections of the Public Service Commission Act of Montana (Ch. 52, Laws of 1913; 3879-3913, Revised Codes of Montana, 1921) assailed by the bill of complaint as being in violation of the Fourteenth Amendment to the Constitution of the United States, are as follows:

3891. Schedule of Rates, Tolls and Charges:

Every public utility shall file with the commission within a time fixed by the commission, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith, or performed by any public utility controlled or operated by it. The rates, tolls and charges shown on such schedules shall not exceed the rates, tolls and charges in force at time of passage of this act. Every public utility shall file with and as a part of such schedule, all rules and regulations, that in any manner affect the rates charged or to be charged for any service. A copy of so much of said schedule as the commission shall deem necessary for the use of the public, shall be printed in plain type, and kept on file in every station or office of such public utility, where payments are made by the consumers or users, open to the public, in such form and place as to be readily accessible to the public and as can be conveniently inspected.

When a a schedule of joint rates or charges

is or may be in force between two or more public utilities, such schedule shall in like manner, be printed and filed with the commission and so much thereof as the commission shall deem necessary for the use of the public shall be filed in every station or office as prescribed in the first paragraph of this section.

No change shall thereafter be made in any schedule, including schedules of joint rates, except upon twenty days' notice to the commission, and all such changes shall be plainly indicated upon existing schedules, or by filing new schedules in lieu thereof ten days prior to the time the same are to take effect; provided that the commission upon application of any public utility, may prescribe a less time within which a reduction may be made; provided, however, that no advance or reduction of existing schedules shall be made without the concurrence of the commission. Copies of all new or amended schedules shall be filed and posted in the stations or offices of public utilities as in the case of original schedules. The commission may prescribe such changes in the form in which the schedules are issued by any public utility as may be found to be expedient.

3906. Action to Set Aside Rates or Charges Fixed by Commission:

Any party in interest being dissatisfied with an order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, may within

ninety days commence an action in the district court of the proper county against the commission and other interested parties as defendants to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order is unlawful or unreasonable, or that any such regulation, practice or service, fixed in such order is unlawful or unreasonable. The commission and other parties defendant shall file their answer to said complaint within thirty days after the service thereof whereupon such action shall be at issue and stand ready for trial upon twenty days' notice to either party.

All actions brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the court shall always be deemed open for the trial thereof, and the same shall be tried and determined as other civil actions; any party to such action may introduce evidence in addition to the transcript of the evidence offered to said commission.

No injunction shall issue suspending or staying any order of the commission except upon application to the court or judges thereof, notice to the commission having been first given and hearing having been had thereon; provided, that all rates fixed by the commission shall be deemed reasonable and just, and shall remain in full force and effect until final determination by the courts having jurisdiction.

If, upon the trial of such action, evidence shall be introduced by the plaintiff which is

found by the court to be different from that offered upon hearing before the commission, or additional thereto, the court before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon receipt of such evidence, the commission shall consider the same and may modify, amend, or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulation, practice or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

If the commission shall rescind its order complained of, the action shall be dismissed. If it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon, as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

Either party to said action within sixty days after service of a copy of the order or judgment of the court may appeal or take the case up on error as in other civil actions. Where an appeal is taken to the Supreme Court of Montana the cause shall, on the return of the papers to the higher court, be immediately placed on the calendar of the then pending term, and shall be assigned

and brought to a hearing in the same manner as other causes on the calendar.

In all actions under this act the burden of proof shall be upon the party attacking or resisting the order of the commission to show that the order is unlawful or unreasonable, as the case may be.

3908. Public Utility Violating Laws or Failing to Comply with Order:

If any public utility shall violate any provision of this act, or shall do any act herein prohibited, or shall fail, or refuse to perform any duty enjoined upon it, or upon failure of any public utility to place in operation any rate or joint rate or do any act herein prohibited, for which a penalty has not been provided, or shall fail, neglect or refuse to obey any lawful requirement or order made by the commission or any court, for every such violation, failure or refusal, such public utility shall be subject to the penalty prescribed by Section 3888 of this Code.

The following sections of the Public Service Commission Act of Montana, supra, are of importance in connection with the questions presented:

3880. Railroad Commissioners as Ex-officio Commission:

The board of railroad commissioners of the State of Montana shall be ex-officio, the public service commission hereby created, and for the purposes of this act shall be known and styled "Public Service Com-

mission of Montana." It shall provide itself with a seal bearing these words, by which its official acts shall be authenticated in all cases where a seal is required; and in the name as above set forth, it may sue and be sued in the courts of the state and of the United States. The secretary of the railroad commission of Montana shall act as secretary of the commission hereby created, but the business of the public service commission shall be kept entirely separate from that of the railroad commission.

3883. Public Utilities to Furnish Service for Reasonable Charges:

Every public utility is required to furnish reasonably adequate service and facilities. The charge made by any public utility for any heat, light, power, water, telegraph or telephone service, produced, transmitted, delivered or furnished, or for any service to be rendered as, or in connection with any public utility shall be reasonable and just, and every unjust and unreasonable charge is prohibited and declared unlawful.

3888. Failure of Public Utility to Make Reports or Permit Examinations:

Any officer, agent or person, in charge of the books, accounts, records and papers, or any of them, of any public utility, who shall refuse or fail for a period of thirty days, to furnish the commission with any report required by the provisions of this act, and any officer, agent or person in charge of any particular books, accounts, records or papers relating to the business of such pub-

lic utility, who shall refuse to permit any commissioner or other person duly authorized by the commission, to inspect such books, accounts, records or papers on behalf of the commission, shall be subject to a fine of not less than one hundred dollars, or more than five hundred dollars, such fine to be recovered in a civil action upon the complaint of the commission in any court of competent jurisdiction; and each day's refusal or failure on the part of such officer, agent or person in charge, shall be deemed a separate offense, and be subject to the penalty herein prescribed.

3899. Fixing Rates and Making Regulations on Hearing—Complaints by Public Utility:

If, upon such hearing, and due investigation, the rates, tolls, charges, schedules or joint rates shall be found to be unjust, unreasonable or unjustly discriminatory, or to be preferential or otherwise in violation of the provisions of this Act, the Commission shall have the power to fix and order substituted therefor, such rate or rates, tolls, charges, or schedules, as shall be just and reasonable. If it shall in like manner be found that any regulation, measurement, practice, act or service complained of, is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of the provisions of this act, or if it be found that the service is inadequate, or that any reasonable service cannot be obtained, the commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts, and make such order relating thereto as may

be just and reasonable.

When complaint is made of more than one rate, charge or practice, the commission may in its discretion, order separate hearing upon the several matters complained of, and at such times and places as it may prescribe. The commission may at any time, upon its own motion, investigate any of the rates, tolls, charges, rules, regulations, practices and service, after a full hearing, as above provided, by order, make such changes as may be just and reasonable the same as if a formal complaint had been made.

Any public utility may make complaint as to any matter affecting its own product or service with like effect, as though made by any mercantile, agricultural or manufacturing society, body politic. or municipal organiaztion or person or persons. Notice of the hearing upon any such complaint shall be given to the persons interested in such manner as the commission may by rule prescribe.

The following statutes (5074-5077, Revised Codes of Montana, 1921) relate to the granting of franchises by municipalities:

5074. Franchise, How Granted:

The council must not grant a franchise or special privilege to any person save and except in the manner specified in the next section. The powers of the council are those only expressly prescribed by law and those necessarily incident thereto.

5075. Grant of Franchise Must be Submitted to Taxpaying Freeholders:

No franchise for any purpose whatsoever shall be granted by any city or town, or by the mayor or city council thereof, to any person or persons, association, or corporation, without first submitting the application therefor to the resident freeholders whose names shall appear on the city or county tax-roll preceding such election.

5076. Same—Notice of Election:

A notice of such election must be published at least in one daily newspaper, if there be one published in the city or town, and if not, in some weekly newspaper of general circulation, at least once a week for three successive weeks, and such notice must be posted in three public places in the city or town. The notice must state the time and place of holding the election, and the character of any such franchise applied for, and the valuable consideration, if any there be, to be derived by the city. At such election the ballots must contain the words, "For granting franchise," "Against granting franchise," and in voting, the elector must make a cross thus, "X," opposite the answer he intends to vote for. Such election must be conducted and canvassed and the return made in the same manner as other city or town elections.

5077. When Voted, Council Must Pass Ordinance:

If the majority of votes cast at the election be "For granting franchise," the mayor and city council must thereupon grant the same by the passage and approval of a proper ordinance.

Service of the above and foregoing Appellants' Brief admitted and receipt of a copy thereof acknowledged this 4th day of March, 1933.

GUNN, RASCH, HALL & GUNN,

E. G. TOOMEY,

Attorneys for Appellee,

By.....

Of Counsel.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1932

No. 627

PUBLIC SERVICE COMMISSION OF MONTANA, et al.,

Appellants,

vs.

GREAT NORTHERN UTILITIES COMPANY,

Appellee.

Appeal from the District Court of the United States, in and for the District of Montana.

Brief for Appellee

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GREAT NORTHERN UTILITIES COMPANY,

Appellee.

Appeal from the District Court of the United States, in and for the District of Montana.

Brief for Appellee

The order in question is violative of the due process of law clause of the 14th Amendment for the reasons:

1. The effect of said order is to deprive appellee of the right of competition in rates essential to pro-

tection and preservation of its property and business.

2. The order deprives appellee of the right to charge rates concededly less than reasonable rates.

3. The Commission in making said order did not apply the principle of a fair return but adopted an erroneous rule of law.

4. The order is not supported by the evidence introduced before or by the findings of the Commission.

5. The order was not made in the interest of the public but in the interest of the Citizens Gas Company.

6. The rates prescribed by said order are insufficient to furnish appellee a fair return.

ARGUMENT AND AUTHORITIES

I.

The order is violative of the due process of law clause of the 14th Amendment in depriving appellee of the right of competition in rates essential to the protection and preservation of its property and business.

The gas system of appellee had been installed pursuant to a franchise granted by the City of Shelby and was in operation about five years before the Citizens Gas Company entered the field as a competitor in October, 1928. The system was designed and is of

capacity to meet the present and future requirements of the city and its inhabitants and appellee has an ample supply of natural gas (R. 3). The franchise of the Citizens Gas Company was granted to a local company promoted by the citizens of Shelby and it was the announced intention of the grantee of the franchise to enter into competition with appellee (R. 44). The distribution system of the Citizens Gas Company, at the time of the hearing before the Public Service Commission, covered the business section and a portion of the residential section of the city (R. 44 and 45), but has been extended until it is now substantially a duplication of the system of appellee, as shown by Plaintiff's Exhibit No. 2 (R. 82-A and 82-B).

In October, 1928, when the Citizens Gas Company commenced furnishing gas, the appellee was charging rates approved by the Commission, consisting of a base rate of 50c per M. cubic feet and lower rates for increased consumption. The initial rates of the Citizens Company, approved by the Commission, consisted of a base rate of 35c per M. cubic feet and lower rates for increased consumption. (R. 45).

At the time the Citizens Company commenced operating in the fall of 1928, appellee had 485 customers and within a short time 137 of these customers

became customers of the Citizens Gas Company. (R. 5, 61 and 66).

It was in view of this situation that appellee entered upon what is termed by the Commission a "rate war" and filed with the Commission a proposed schedule of rates designated as "Schedule 4-A." (Tr. 5-6). The dates proposed by this schedule consisted of a rate of 20c per M. cubic feet up to 300,000 cubic feet per month and 15c per M. cubic feet for the excess. (R. 45).

The Citizens Company promptly complained of the rates so proposed on the grounds that the same were "unfair, unjust and unreasonable" to the company and constituted "unjust and unfair" competition. (R. 45). A hearing was had by the Commission on December 20, 1928, and at this hearing the Citizens Company and twelve customers (presumably stockholders of that company) were the only protestants against the rates proposed by Schedule 4-A. (R. p. 17).

As a result of the hearing, the Commission found and determined the present value of the system of appellee to be $46,091.72 (R. 62) and that the rates proposed by Schedule 4-A would not yield sufficient revenue to defray normal operating expenses, including a fair allowance for depreciation and were therefore

"unjust and unreasonable," for which reason the Commission refused to approve same upon the theory that it was to the public interest that appellee should earn sufficient to maintain its plant and render adequate service. (R. 69).

The Commission, after having determined that the rates proposed by Schedule 4-A are unjust and unreasonable, prescribed the schedule of rates set forth in the order in question, which were identical with the initial rates of the Citizens Company that had been approved by the Commission.

The system of the Citizens Gas Company was purchased by the citizens of Shelby (R. p. 101). The officers and directors of the Citizens Company were residents of the city of Shelby. The mayor of the city who is also a member of the school board, is president of the company. (R. 100). There are 43 subscribers to the capital stock of the Citizens Company "among the citizens of Shelby" and all but two are customers of said company (R. 102). The City of Shelby has a population, according to the 1930 Federal census, of 2004.

In January, 1930, the Citizens Company made a reduction in rates and adopted a rate of 23c per M. cubic feet, with a discount of 3c if paid on or before the 10th of the month, and this is the rate now being

charged. This rate was submitted to the Commission for approval in March, 1930. The Commission has never made any investigation of the rates of the Citizens Company or the value of its property or of its operation (R. 100-101).

From the table presented in the brief for appellant, (page 91), it appears that the volume of gas sold by appellee has decreased each year since 1928, while the volume of gas sold by the Citizens Company has increased each year. For the first seven months of 1932, the appellee sold 39,559,000 cubic feet of gas, notwithstanding the rate was reduced to 15c per M. cubic feet September 1st, 1931, while, during the same period, the Citizens Gas Company sold 67,599,000 cubic feet. In 1931, appellee sold 55,869,-000 cubic feet, which was less than one-half the amount sold in 1927, before competition began.

The appellee, in September, 1931, adopted a flat rate of 15c per M. cubic feet for the purpose of holding the customers it had and with a view of enlarging its list of customers. The reduction thus made did not have the effect of increasing the number of customers or the volume of sales (R. 96).

In view of these undisputed facts, there can be no doubt that if appellee is required to put into effect the schedule of rates prescribed by the order in question,

its business and property will be of no value whatever, as it would lose all of its customers and its gas system would be valueless, except possibly for a small salvage value.

The earnings of a public utility are not only dependent upon rates, but also upon patronage. Rates which, because of competition, will deprive a utility of its patronage and may ultimately require the utility to abandon the field to a competitor, are as objectionable, from the standpoint of confiscation, as rates which will not furnish a fair return where there is no competition. *The power of regulation does not warrant confiscation, whether resulting from rates unreasonably low or from rates which will deprive the utility of its patronage.*

In 10th Corpus Juris, page 420, it is said:

> "Competition is a very important factor in determining the reasonableness of rates, provided it possesses the attribute of producing a substantial and material effect on traffic and rate making, and may be controlling in relation thereto. Carriers must be allowed to meet competition or they must go out of business."

This court in the case of Interstate Commerce Commission v. Chicago G. W. R. Co., 209 U. S. 108, 119, said:

> "It follows that railroad companies * * * * in fixing their own rates * * * * may take into account competition with other carriers, provided

only that the competition is genuine and not a pretense."

If rates to meet genuine competition are deemed reasonable and lawful, it, of course, follows that a utility cannot be compelled to increase such rates when the increase would result in the loss of its patronage to a competitor. Such increased rates would be unreasonable rates.

The rates proposed by Schedule 4-A were condemned by the Commission because it was found that they would not "even yield enough revenues to defray normal operating expenses, including a fair allowance for depreciation," and it was argued by the Commission that it is to the public interest that appellee should earn sufficient to maintain its plant and render adequate service, (R. 69). It is wholly immaterial so far as the public is concerned whether the failure to maintain the plant and render adequate service is due to lack of earnings because of unreasonably low rates, or to insufficient revenue because of loss of patronage.

Although the rates provided in Schedule 4-A were charged by the appellee from November 1, 1928, to September 1, 1931, when the rate was reduced to 15c per M. cubic feet, (R. 91), there is no evidence that the gas system of appellee has not been properly main-

tained or adequate service furnished. If appellee and its stockholders are willing, as they have been, to maintain the system and furnish gas at these rates, the public is not injured, but, on the contrary, is benefitted by such low rates. The losses willingly suffered by appellee cannot be taken into account in determining reasonable rates for the future.

Public Utilities Commission v. N. Y. Telephone Co., 271 U. S. 23;
Ga. Ry. & Power Co. v. R. R. Commission, 262 U. S. 625.

The only complaint against these rates is by the Citizens Gas Company and its customers. These customers are not affected by these rates and the only interest of the Citizens Gas Company is the private selfish interest of destroying the business and property of its competitor, the appellee, in keeping with its avowed intention when it entered the field.

The trial court found:

> "That the rates prescribed by the Commission for the plaintiff company deprive it of the right of competition, which right plaintiff has in the circumstances disclosed and said rates, if applied to plaintiff's operations, would destroy its property." (R. p. 24).

In the majority opinion of the lower court, on the application for an interlocutory injunction, it is said:

> "When the state launches two upon the sea of

competition, and the plank of patronage will support but one, it cannot in reason deny them the right of necessity to fight to a finish for financial life, even as may two castaways at sea battle to the death for the spar which will support but one, without any wrong to the survivor attaching." (52 Fed. (2d) 802, 805).

If rates to meet genuine competition are deemed reasonable and lawful, it, of course, follows that a utility cannot be compelled to increase such rates when the increase would result in the loss of its patronage to a competitor. Such increased rates would be unreasonable rates.

Texas Electric Service Co. v. City of Seymour, 54 Fed. (2d) 97.

If, as we contend, and as decided by the trial court, the compelling of appellee to increase its rates will have the effect of destroying its business and rendering its gas system valueless, the state statute, if it authorizes this to be done, as argued for appellants, is violative of the due process of law clause of the 14th Amendment.

It is argued for appellants (Appellants' Brief, pp. 50 to 56) that as the Supreme Court of the State has decided that the state statute authorizes the prescribing of precise or minimum rates, the trial court in this case in deciding that the rates prescribed by the

order in question are unreasonable, failed to give effect to the statute of the state as so construed and recognized an unauthorized exception to the statute.

In the opinion of the Supreme Court of the State of Montana in the case referred to,—88 Mont. 180-203, —it is said:

> "The trial court did not consider the testimony adduced at the hearing before the Commission, and no opportunity was offered for the submission of any additional testimony, for plaintiff's motion for judgment on the pleadings was granted. The rates determined upon must be just and reasonable. (Sec. 3899, Rev. Codes 1921). This court does not have before it any testimony whatsoever. What constitutes 'just and reasonable' rates must, of necessity, depend upon the facts in each case. A rate altogether just and reasonable in one instance may be most unjust and unreasonable in another. Not having the facts before us, this court is unable to determine whether the rates fixed are just and reasonable; and therefore we hold that that matter is not before us for consideration."

Whether the rates would have been held reasonable in the light of the record in this case was not before the Supreme Court of the State and as said by that court, "A rate altogether just and reasonable in one instance may be most unjust and unreasonable in another."

II.

The right to charge any rate not discriminatory within the limits of a reasonable rate is a right guaranteed by the due process of law clause of the 14th Amendment.

In determining whether a statute of a state affecting life, liberty or property is violative of the due process of law clause of the 14th Amendment, it is necessary to inquire whether the statute is within the legislative power. If it is within such power, it is not prohibited by this amendment, but if it is not within such power it is within the prohibition of the amendment.

The legislative power of a state must be tested and determined by the principles of the common law because that is the source from whence such power is derived. Mr. Cooley in his work on Constitutional Limitations, Seventh Edition, page 124, says:

> "In considering the powers which may be exercised by the legislative department of one of the American states, it is natural that we should recur to those possessed by the Parliament of Great Britain, after which, in a measure, the American Legislatures have been modelled, and from which we derive our legislative usages and customs, or parliamentary common law, as well as the precedents by which the exercise of legislative power in this country has been governed. It is natural, also, that we should incline to measure the power of the legislative department in

> America by the power of the like department in Britain; and to concede without reflection that whatever the legislature of the country from which we derive our laws can do, may also be done by the department created for the exercise of legislative authority in this country."

In England the legislative power of Parliament was controlled and limited by the provision in Magna Charta declaring that no person shall be deprived of life, liberty, or property, "but by the judgment of his peers or the law of the land." This provision while differing in language from the due process of law clause of the 14th Amendment had the same meaning. In the case of Den v. The Hoboken Land and Improvement Co., 18 Howard (U.S.) 272, the court said:

> "The words 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land,' in Magna Charta. Lord Coke, in his commentary on those words (2 Inst. 50), says, they mean due process of law."

In the Munn case, 94 U. S. 113, in discussing the legislative power of a state, the court said:

> "While this provision of the Amendment is new in the Constitution of the United States as a limitation upon the powers of the states, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the Union. By the 5th Amendment, it was introduced into the Constitution of

the United States as a limitation upon the powers of the National Government, and by the 14th, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament and, through their State Constitutions or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective states, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the states and of the people of the states was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the states, so that now the governments of the states possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions."

The court further said:

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. *Looking, then, to the common law, from whence came the right which the Constitution protects*, we find that when private property is 'affected with a

public interest, it ceases to be *juris privati only*'." (Italics ours).

For the same reason that the court in that case found it necessary to refer to the principles of the common law in determining whether the prescribing of maximum rates was violative of the due process of law clause of the 14th Amendment, it is necessary to consider the common law in determining whether the prescribing of minimum rates is within the legislative power.

In the opinion in the Munn case, the court, after reviewing the English cases, said:

"We have quoted thus largely the words of these eminent expounders of the common law, because, as we think, we find in them the principle which supports the legislation we are now examining. * * * *

In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or *perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable.* * * * * The controlling fact is the power to regulate at all. If that exists, the right to establish the *maximum of charge*, as one of the means of regulation, is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use." (Italics ours).

The common law rule as announced in the English

cases cited and discussed in the opinion in the Munn case requires the rate or charge to be limited to a "reasonable" charge or rate. The whole import of the opinions of the English courts to which reference is made is that the principle of regulation so far as rates or charges are concerned is for the purpose of preventing extortionate or unreasonable charges. It was undoubtedly in view of this fact that the court in the Munn case, in order to correctly state the principle of regulation of rates, as deduced from the English authorities, qualified the statement that the common law authorized the "legislature to declare what shall be a reasonable compensation" by adding the words, "*or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unnreasonable.*"

We further quote from the opinion in the Munn case as follows:

> "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the *extent of the interest he has thus created.*" (Italics ours).

From the briefs as published with the opinion in the Munn case, it appears that it was argued that if the power to regulate charges exists, minimum rates may be prescribed. When, therefore, the court announced its purpose to ascertain the power to regu-

late rates and then defined what is within and what is without the "operative effect" of such power, the statement that the power is limited to the "fixing of a maximum beyond which any charge made would be unreasonable" cannot be otherwise construed than that the power does not embrace the fixing of minimum rates.

In the concluding paragraph of the opinion, it is said:

> "In passing upon this case, we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character were argued before us more than a year ago by the most eminent counsel, and in a manner worthy of their well earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations."

It thus appears that the opinion was not one hastily expressed but the result of great deliberation and it must be assumed that every statement made was considered and weighed before the opinion was announced.

But whatever may be said with reference to the Munn case establishing the proposition that the legislative power at common law was limited to the prescribing of maximum rates, in later cases, this court has definitely and positively so decided.

In the case of Skinner & Eddy Corp. v. United

States, 249 U. S. 557, 564, 565, the court in the opinion, referring to the Interstate Commerce Act, said:

> "The original act, proceeding upon the common-law rule which prohibits public carriers from charging more than reasonable rates, gave the Commission power to declare illegal one unduly high; but even after such a determination the Commission lacked the power to fix the rate which should be charged. * * * *
>
> Congress, however, steadfastly withheld from the Commission power to prevent by direct action the charging of unreasonably low rates. *The common law did not recognize that the rate of a common carrier might be so low as to constitute a wrong;* and Congress has declined to declare such a rule. Despite the original Act to Regulate Commerce and all amendments, railroads still have power to fix rates as low as they choose and to reduce rates when they choose." (Italics ours).

In the case of Interstate Commerce Commission v. Chicago Great Western Ry. Co., 209 U.S. 108, 119, the court quotes approvingly from an opinion of the Interstate Commerce Commission as follows:

> "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, *the act to regulate commerce leaves common carriers as they were at the common law—free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their*

own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." (Italics ours).

After thus quoting, the court in the opinion said:

"It follows that railroad companies * * * * in fixing their own rates, they may take into account competition with other carriers, provided only that the competition is genuine, and not a pretense."

The decision in the Munn case as to the limitations of legislative power in regulating rates has been accepted and followed in all subsequent cases by this court and in defining the power the court has uniformly limited it to the fixing of maximum rates.

Budd v. State of New York, 143 U. S. 517, 36 L.Ed. 246;
Dow v. Beidelman, 125 U. S. 680, 31 L.Ed. 841;
Cotting v. Goddard, 183 U. S. 79, 46 L. Ed. 92.

While the decision in the Munn case is controlling, we find that other courts have given the same construction or meaning to the common law. In the case of Lough v. Outerbridge, 143 N.Y. 271, the court, in discussing the rights and duties of a common carrier, said:

"When the service is performed for a reasonable and just hire the public have no interest in the question, whether one or many are engaged in it. The monopoly which the law views with

disfavor is the manipulation of a business in which the public are interested in such a way as to enable one or a few to control and regulate it in their own interest, and to the detriment of the public, by exacting unreasonable charges, *but when an individual or a corporation has established a business of a special and limited character, such as the defendants in this case had, they have a right to retain it by the use of all lawful means. That was what the defendants attempted to do against a competitor that engaged in it, not regularly or permanently, but incidentally and occasionally. The means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met, and when it disappeared to resume the standard rates, which, upon the record, did not at any time exceed a reasonable and fair charge. I cannot perceive anything unlawful or against the public good in seeking by such means to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines.*" (Italics ours).

See also:

Fitchburg R. R. Co. v. Gage, et al, 12 Gray (Mass.) 393;
Johnson v. Pensacola, etc. R. R. Co., 16 Fla. 623, 26 Am. Rep. 731.

We concede that the Interstate Commerce Commission has power to prescribe minimum rates by virtue of the Transportation Act of 1920. In other words, the power was legally conferred, notwithstanding the due process of law clause of the 5th Amendment to the Federal Constitution.

In determining the question of whether the statute of a state violates the due process of law clause of the 14th Amendment, it is necessary to determine what is within and what without such legislative power from a consideration of the common law as we have already pointed out. In determining whether an act of Congress violates the due process of law clause of the 5th Amendment, it is only necessary to inquire whether Congress has exercised a power granted by the Federal Constitution. If the power has been granted, of course, there can be no conflict with the 5th Amendment, which became effective in 1798 or several years after the adoption of the Constitution.

Among the powers granted to Congress by Article I of the Federal Constitution is the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." It was by virtue of this power that the Transportation Act of 1920 was enacted.

If then this power to regulate authorizes the prescribing of minimum rates, it follows that the Transportation Act is not violative of the 5th Amendment. As said in the case of Brushhaber v. Union P. R. Co., 240 U. S. 1, 24, which involved the taxing power of Congress:

"the Constitution does not conflict with itself

> by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process of law clause."

This observation, of course, is equally true with reference to the power to regulate commerce.

In the case of Prout v. Starr, 188 U. S. 537, 543, it is said:

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the 11th Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states," etc.

In the case of Billings v. United States, 232 U. S. 261, 282, the court said:

> "It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the Amendments thereto, especially by the due process clause of the 5th Amendment."

The 5th Amendment in no manner affected the powers granted Congress by the Constitution. The effect of the amendment was to limit and confine

Congress to the proper exercise of the powers granted. In this respect the 5th Amendment has the same effect upon Congress that the 14th has upon the legislatures of the states.

It is true that in the opinions of this Court we find expressions to the effect that the due process clause of the 5th Amendment has the same meaning as the due process clause of the 14th Amendment, as both are couched in the same language. The court, however, did not by these statements intend to say that whatever legislation is within the powers of Congress is also within the legislative power of a state. The two amendments have the same meaning in that they are both restraints upon legislative power,—one, the legislative power of Congress, and the other the legislative power of a state. They cannot and do not have the same meaning in the respect that whatever Congress may do in the exercise of legislative powers granted by the Constitution may also be done by a state in the exercise of its legislative power.

In the case of Gibbons v. Ogden, 9 Wheaton 1, 196, Chief Justice Marshall defined the power to regulate commerce as follows:

> "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to

its utmost extent and acknowledges no limitations, other than are prescribed in the Constitution."

Whatever the power of Congress to regulate commerce before the adoption of the 5th Amendment included, it includes now. The 5th Amendment to no extent curtailed this power.

In the case of Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 229, the court in referring to the 5th Amendment, said:

> "*The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution,* and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the states." (Italics ours).

When it is considered that there is no common law of the United States, and that the Constitution of the United States emanated from the people who were in no manner limited in granting powers to Congress, whereas the states can only exercise the legislative power recognized and sanctioned by the common law,

it must follow that the legislative powers of Congress cannot be measured by the legislative power of a state or vice versa.

In the case of Martin v. Hunter's Lessee, 1 Wheaton, 304, 324, the court, in an opinion by Justice Story, said:

> "The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by 'the people of the United States.' There can be no doubt that it was competent to the people to invest in the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority."

Mr. Cooley, in his work on Constitutional Limitations, Seventh Edition, page 9, in discussing the Federal Constitution, said:

> "As much larger powers were vested by this instrument in the general government than had ever been exercised in this country by either the Crown, the Parliament, or the Revolutionary Congress, and larger than those conceded to the Congress under the Articles of Confederation, the assent of the people of the several states was essential to its acceptance," etc.

In the case of Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L.Ed. 1103, it was contended that the case of Wilson v. New, 243

U. S. 332, in which it was held that an act of Congress regulating the wages of employees of carriers engaged in interstate commerce was constitutional, was conclusive of the constitutionality of a statute of Kansas authorizing the fixing of wages. The court, in the opinion, said:

> "The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress *through its power over interstate commerce, furnishes no precedent for regulation* of the business of the plaintiff in error, whose classification as public is, at the best, doubtful. * * * *
>
> We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the 14th Amendment, and deprives it of its property and liberty of contract without due process of law." (Italics ours).

In the opinion in the Dayton Goose Creek R. Co. case, 263 U. S. 456, in which the constitutionality of the recapture provision of the Transportation Act of 1920 was sustained, the court discusses the extent of the power of Congress to regulate commerce and states the reasons for the broad and comprehensive power conferred by that Act upon the Interstate Commerce Commission over rates for common carriers. The reasons thus stated can have no application to rates for a utility not engaged in interstate

commerce and furnishing a single commodity such as gas or water. A railroad engaged in interstate commerce transports hundreds of different commodities and the rate for each article carried has a relation to all other rates and must be considered in fixing rates which will furnish a fair return.

* * * * *

If, as we contend, the power of regulation of rates by a state is limited to the prescribing of maximum rates, and that the owner of property affected with the public interest may charge rates less than just and reasonable rates, provided the same are not discriminatory, the order in question deprives the plaintiff of the liberty of contract and takes its property without due process of law, in violation of the 14th Amendment.

In the case of Lochner v. New York, 198 U. S. 45, 49 L.Ed. 937, the court said:

> "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."

In the case of Tyson & Bro. v. Banton, 273 U. S. 418, 429, which involved the constitutionality of a statute fixing the price of theatre tickets, the court, in the opinion, said:

"In the endeavor to reach a correct conclusion

in respect of this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. *The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself,* State Freight Tax Case, 15 Wall. 232, 278, 21 L.Ed. 146, 162, and, as such, within the protection of the due process of law clauses of the 5th and 14th Amendments, See Carrollton v. Bazzette, 159 Ill. 284, 294, 31 L. R. A. 522, 42 N. E. 837. *The power to regulate property services or business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all.*" (Italics ours).

In the case of Coppage v. Kansas, 236 U. S. 1, 14, 59 L.Ed. 446, the court said:

> "Included in the right of personal liberty and the right of private property—partaking of the nature of, each—is the right to make contracts for the acquisition of property."

III.

The Commission did not apply the Principle of a fair Return in making the Order.

The Commission was without power to fix rates which are not in accord with the principle of a fair return on present value. A fair return is essential to due process of law.

In the case of Board of Public Utility Comrs. v.

N. Y. Telph. Co., 271 U. S. 23, 31, the court said:

> "The just compensation safeguarded to the utility by the 14th Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. And rates not sufficient to yield that return are confiscatory."

See also:

Bluefield W. W. & Imp. Co. case, 262 U.S. 679.

The Commission in its decision and report said:

> "*Were we to attempt to apply the principle of a fair return upon a fair value in this case, we would arrive at a manifestly exorbitant rate.*" (Italics ours.)

In the decision and report it is also said:

> "It is inevitable that two companies serving a territory that legitimately offers but enough business for one of the companies to operate on at a fair profit, will have to respectfully accept a return that will be less than a fair return under ordinary conditions." (R. 75).

It thus appears that the principles of a fair return which is essential to due process of law in the making of rates, was not followed by the Commission in making the order in question, and that it was not intended that the rates prescribed should furnish a fair return upon the property of appellee used and useful in furnishing the service. The rule of rate making used seems to have originated with the Commission.

Appellee was not responsible for the duplication of systems or for what is regarded by the Commission

as an "over-investment," and it would indeed be a harsh rule which would require appellee to accept less than a fair return which it is conceded the rates prescribed by this order will not furnish.

A rate order based upon an erroneous rule of law must be set aside.

> Tagg Bros. & Moorhead v. U.S., 280 U.S. 420, 442.

If the appellee is not entitled to protect its property and business by competition in the matter of rates, and the Commission is authorized to prescribe minimum rates, we then submit that the appellee is entitled to have such rates fixed upon the principles of rate making required by the due process of law clause of the 14th Amendment.

In the case of Atchison T. & S. F. Ry. Co. v. I. C. C., 190 Fed. 591, 594, it is said:

> "Whatever, therefore, the rights of the carriers may be to give reduced rates for the purpose of fostering a new or an established industry or for granting to it a higher measure of protection against foreign competition than Congress, through the revenue laws, has given it, no such power can lawfully be exercised by the commission."

See also:

> Atlantic Coast Line Co. v. Trammell, 287 Fed. 741;
> Southern Pac. Co. v. I. C. C., 219 U. S. 433, 55 L.Ed. 283.

IV.

Said Order is not supported by the Evidence introduced before or by the Finding of the Commission.

In fixing the rates prescribed in the order in question, the Commission first determined the present value of the system as $46,091.72 (R. 62). The Commission then found that Shelby "affords an annual consumption of approximately 120,000,000 cubic feet of gas," basing this finding upon the amount of gas sold by appellee before the Citizens Gas Company had entered the field as a competitor. (R. 76). The Commission proceeded to determine the cost per thousand cubic feet of supplying this amount of gas to the people of Shelby, and based the rates in question upon this cost and upon the assumption that the appellee would continue to sell this quantity of gas. (R. 76). This assumption, of course, was wholly unwarranted as the appellee had 485 customers when the Citizens Gas Company commenced operations in October, 1928, and at the time of the hearing in December, 1928, 135 of these customers had become customers of the Citizens Gas Company. (Tr. p. 61). It appears that during the year 1929 the appellee sold only 73,160,500 feet of gas and that the volume sold each year has constantly decreased. (R. 93).

It would seem from the report and decision of the Commission, and from the fact that the rates prescribed are identical with the rates which were being charged by the Citizens Gas Company, at the time the order was issued, that what the Commission had in mind was not the fixing of rates for appellee, but the fixing of rates for both companies. In fact, in the brief for Appellants, on pages 35, 36 and 102, the theory upon which these rates were prescribed is now disclosed and for the first time announced. It is argued that considering the aggregate value of both utilities and the aggregate volume of sales by both utilities, the rates are reasonable. The value of the property of the Citizens Gas Company, or its operations, had never been investigated by the Commission, at the time it prescribed rates for appellee (R. 101), and therefore, there was no evidence before the Commission upon which to fix rates upon the basis of the aggregate value of the properties of the two companies at the time the order was issued.

Appellants recognize this condition but seek to supply the deficiency in proof by constructing out of the evidence taken before the trial court, four years after the issuance of the order in question, a hypothetical aggregate rate base, operations, etc., (Appellants' Brief 89-102).That this method is not worthy of

serious consideration is plain from appellants' brief:

> "* * * * there is not legal and competent evidence in the record upon which to base positive findings upon certain of these factors." (Appellants' Brief, 94).

i. e. revenues, expenses, depreciation, value of property, fair return, etc. And again,

> "While there is not competent evidence in the record upon which to predicate an absolute finding as to aggregate present fair value of the two plants or systems, *there is sufficient evidence from which an approximate idea of the claimed values* of the respective plants can be obtained." (Appellants' Brief, 98, and see Appellants' Brief, 102).

As said by this court in the case of Northern P. R. Co. v. Department of Public Works, 268 U.S. 39, 44-45:

> "An order based upon a finding made without evidence, or upon a finding made upon evidence which clearly does not support it, is an arbitrary act against which courts afford relief. * * * * It was a denial of due process."

V.

Rates in question were not prescribed in the interest of the Public but in the interest of the Citizens Gas Company.

In the complaint, in paragraph XXI, (R. p. 7), it is alleged that:

> "said order was made arbitrarily and capriciously without regard to the public interest, and

> in the interest of and for the purpose of increasing the earnings and enhancing the value of the property of the said Citizens Gas Company."

As we have already pointed out, the only complaint made to the Commission was by the Citizens Gas Company and its customers, presumably stockholders in that Company. The theory upon which the Commission asserts the right to require appellee to increase its rates is that it is to the interest of the public that appellee should earn sufficient to maintain its plant and render adequate service. (R. p. 69).

It has now been over four years since the order in question was made, and there is no evidence that the gas system of appellee has not been properly maintained, or that the service furnished has been in any sense inadequate, or that there has been a single complaint made. It would seem that until the system of appellee is not properly maintained, or the services inadequate, or there is some complaint by the public, the theory advanced does not warrant the Commission in requiring an increase in rates.

As we have already argued, it is wholly immaterial to the consumers whether loss of revenue which may result in failure to properly maintain the system or in poor service is due to low rates or loss of patronage, and where as conclusively shown in this case an increase in rates would through a loss in patronage de-

crease the revenues, the order in question can only result in benefit to the Citizens Gas Company by destroying the business and property of its competitor. We believe it is a fair deduction from the conceded facts in this case that this order was not made in the interest of the public but in the interest of the Citizens Gas Company as alleged in the bill of complaint.

VI.

Rates prescribed by the Order are insufficient to furnish Appellee a fair return.

In the case of McCardle v. Indianapolis Water Co., 272 U. S. 400, 408, this court said:

> "In every confiscation case, the future as well as the present must be regarded. It must be determined whether the rates complained of are yielding and will yield over and above the amounts required to pay taxes and proper operating charges, a sum sufficient to constitute just compensation for the use of the property employed to furnish the service; that is, a reasonable rate of return on the value of the property *at the time of the investigation and for a reasonable time in the immediate future.*" (Italics ours).

In challenging the rates involved in this case, we are not questioning the findings of the Commission as to the value of the property, operating expenses, depreciation allowed, or rate of return to which the appellee is entitled as determined by the Commission.

What we are contending is that the rates prescribed were insufficient at the time and ever since have been insufficient to furnish the return which the Commission decided was a fair return. (R. 76-77).

In the decision and report of the Commission it is said:

> "What rate of return such a schedule will yield under the competitive conditions now existing at Shelby will largely depend upon the ability of the management to attach new customers, increase consumption among present consumers and to effect such economies in operation as are consistent with adequate service." (R. p. 77).

It is also said:

> "Were we to attempt to apply the principle of a fair return upon a fair value in this case, we would arrive at a manifestly exorbitant rate." (R. 75).
>
> "It is inevitable that two companies serving a territory that legitimately offers but enough business for one of the companies to operate on at a fair profit, will have to respectfully accept a return that will be less than a fair return under ordinary conditions." (R. 75).

As the Commission concedes that the rates prescribed will not furnish a fair return and were not intended to do so, it should not be necessary for the court to look further for support of the contention that the rates are confiscatory.

It is conclusively shown by the testimony of the witness Foster (R. 83 et seq.) and appellee"s Exhibit

5 (R. 92-93) that if the rates prescribed by the Commission had been applied to actual sales of gas from 1928 to July 1st, 1932, the revenues produced would have been insufficient to pay for the gas purchased by appellee and actual operating expenses notwithstanding there has been a considerable reduction in such expenses each year as appears from appellee's Exhibit 3 (R. 92-a).

This evidence is not controverted but evidence was introduced for appellants showing the experience of the Citizens Gas Company during said period (R. 103-110), and it is argued therefrom that the expenses of appellee could have been materially reduced.

It appears that the Citizens Gas Company is a one-man company so far as operation is concerned. The witness Tillman is the manager, secretary and treasurer, and has a 1/8 or 1/9 interest in the company. (R. 108). He receives a salary of $300.00 per month (R. 107). The company does not pay office rent but is permitted to use the building of the manager, who is engaged in the plumbing business. (R. 106). The manager provides a bookkeeper and maintains the plant. (R. 107). The manager also reads the meters, and if any one is employed to do this work, payment therefor is made by the manager out of his salary. (R. 108). The Citizens Gas Company has

paid no federal income tax in the years 1929, 1930, or 1931. (R. 106).

The witness Tillman testified that the total revenues for 1929 were $21,675.24. (R. 106). Total expenses including cost of gas and depreciation was $20,190.49. (R. 106). The item of revenues represented the charges and not the actual collections. (R. 108).

If the Citizens Gas Company had been required to pay 7 cents per M. cubic feet of gas, the amount paid by appellee, instead of 3 cents per M. cubic feet, the rate paid by that company (R. 106), there would have been no return whatever, but a deficit.

Sufficiency of Complaint

It is contended for appellant that the complaint does not present an issue of confiscation because of insufficiency of rates to furnish a fair return.

On the hearing of the application for an interlocutory injunction this same contention was made, and in the concurring opinion of Judge Sawtelle it is said:

> "The defendant commission contends that the plaintiff is not in position to urge the question of confiscation because the complaint does not present the issue, and, secondly, because there is no evidence as to the present fair value, fair rate, etc. The complaint, however, in paragraph XX, does specifically invoke the due process of law clause of the Fourteenth Amendment; and

> the order, on its face, shows that the 'fair return' rule was consciously and deliberately disregarded by the commission. There is, consequently, no need of further evidence on the subject. The report itself is the best evidence." 52 Fed. (2d) 802.

At the final hearing an amendment to the complaint was proposed, alleging that the rates are insufficient to furnish a fair return and if made effective would deprive appellee of its property in said gas system without due process of law in violation of the Fourteenth Amendment. (R. 114). The proposed amendment was said by the trial court to be unnecessary and was disallowed. (R. 23).

As before stated, appellee makes no complaint of the findings of the Commission as to value, etc., but bases its contention of confiscation upon the ground that the rates are insufficient to furnish a fair return.

There was, therefore, no occasion to make any allegations with reference to value, expense of operation, depreciation, or rate of return, and it is clearly alleged in paragraphs XX and XXI of the complaint that the rates are not supported by the evidence, and if adopted would deprive appellee of its property without due process of law, which is the equivalent of an allegation that the rates are insufficient to furnish a fair return.

The statement in paragraph XXI that there is no evidence showing, or tending to show, that the rates are reasonable or just, is clearly the statement of an ultimate fact, as required by Equity Rule 25, and presents the issue of whether the findings made by the Commission sustain the rates prescribed by this order.

The only purpose of introducing any testimony was to show the effect of said rates from experience and sustain the charge that they were insufficient to furnish a fair return upon the value of the property as fixed by the Commission.

As said in the case of Smith v. Illinois Bell Tel. Co., 282 U. S. 133-160, "In determining what is confiscatory regulation of rates, it is necessary to consider the actual effect of the rates proposed in the light of the utilities situation, its requirements and opportunities."

Contention for Appellants that Franchise Contract precludes Appellee from challenging Rates in Question.

Section 3 of the ordinance granting the franchise, pursuant to which the gas system of appellee was installed and is being operated provides:

> "The rates to be charged for gas of whatsoever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of Montana shall order and determine."

The contention is made in behalf of the appellants that by virtue of this provision of the franchise contract, appellee is required to accept the rates in question. (Appellants' Brief, 69-70). It seems unnecessary to make any answer to this contention. This provision, of course, assumed that the rates would be legal rates, such as were within the power of the Commission to prescribe, and not violative of the due process of law clause of the Fourteenth Amendment.

Insufficiency of Findings

It is argued that finding No. 4 (R. 24) is insufficient because of failure to find present value and make other findings required in prescribing rates which will furnish a fair return. What has been said with reference to the sufficiency of the complaint applies equally to the objection to this finding. The court was not required to find what the Commission had already found when there was no controversy over the findings made by the Commission. The question presented was whether the rates prescribed will furnish a fair return in view of the facts as found by the Commission. The finding by the court is of an ultimate fact that such rates will not furnish a fair return.

* * * * *

We are surprised to note the statement in Appellants' Brief, page 89, that the Commission did not

make a finding of what would be a reasonable rate of return. In the report and decision of the Commission (R. 76), it appears that the Commission found that "the cost of gas purchased and cost of doing business, when translated into cost per thousand cubic feet of gas sold amounts to 21.32 cents." There was included 2.82 cents per M. cubic feet of gas sold as an allowance for depreciation. It is said:

> "Rate of return at 8 per cent on the present value of the utility's property amounts to $3,687.33, or about 3 cents per M. cubic feet of gas sold. Aggregating the above costs per thousand cubic feet of gas sold, it appears that a schedule of rates that will yield an average revenue of 27.13 cents per M. cubic feet sold would, under ordinary circumstances, represent a schedule of rates that is capable of earning enough revenues to pay all operating expenses, including depreciation, and a fair return upon the value of property necessarily required to render adequate natural gas service to the consumers of Shelby." (R. 76).

If the Commission did not find that 8% would be a fair return, why were rates prescribed which the Commission assumed would furnish such a rate of return?

The decree should be affirmed.

Respectfully submitted,

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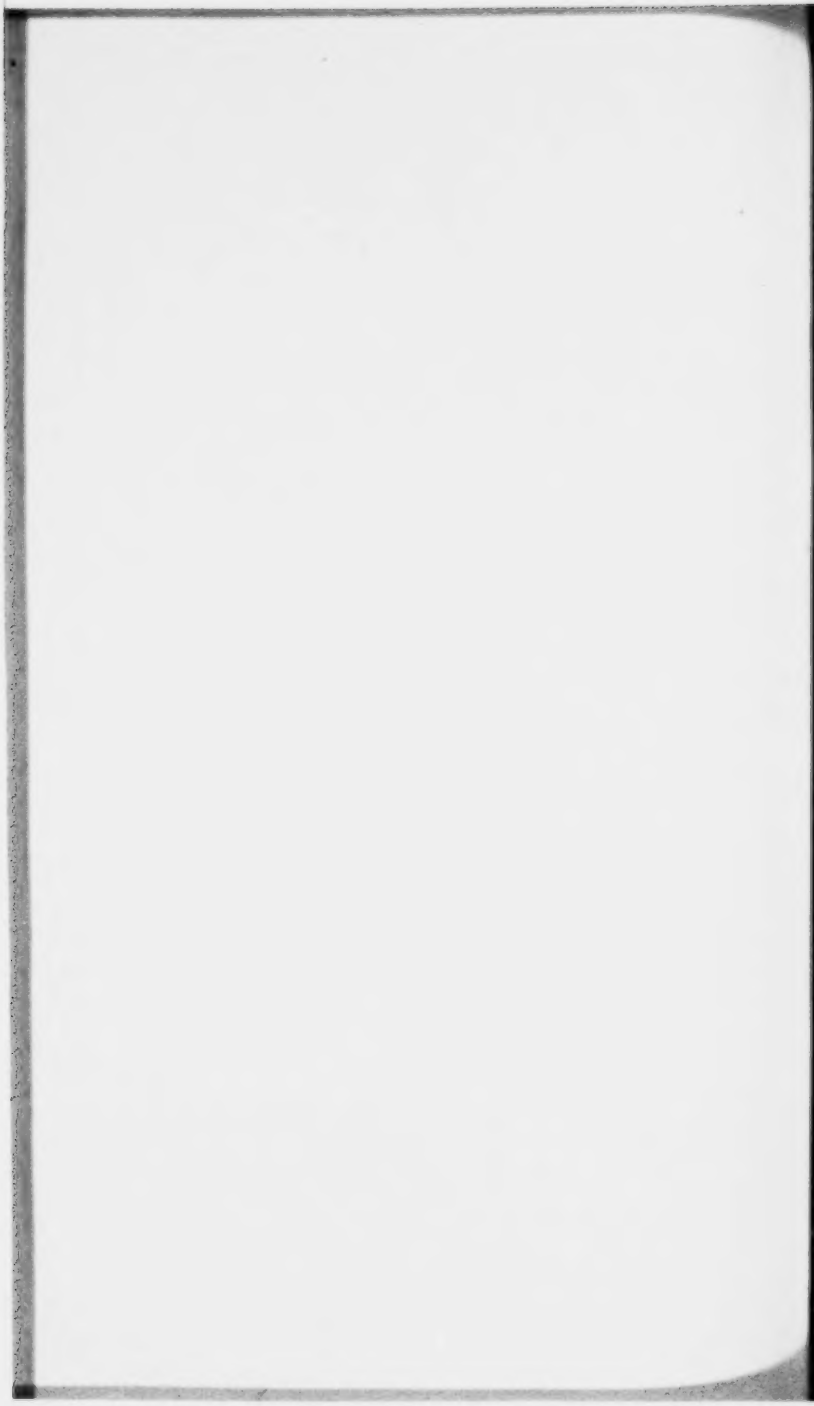

SUPREME COURT OF THE UNITED STATES.

No. 627.—October Term, 1932.

Public Service Commission of Montana, Tom Stout, Thomas E. Carey, et al., etc., Appellants,
vs.
Great Northern Utilities Company.

Appeal from the District Court of the United States for the District of Montana.

[April 10, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

By this appeal we are called on to decide whether an order of the commission prescribing specific, as distinguished from maximum, rates to be charged for natural gas furnished by a public utility is repugnant to the due process clause of the Fourteenth Amendment.

The appellee, authorized by a non-exclusive franchise ordinance, has been engaged since 1923 in furnishing natural gas to consumers in Shelby, a Montana city having a population of about 2,000. It has an adequate distribution system. September 21, 1927, the commission instituted an inquiry as to the reasonableness of its rates. The schedule then in force specified for each customer a base rate of 60 cents per thousand cubic feet for the first five thousand and, by steps, lower rates based on monthly consumption.* Appellee filed a schedule effective November 25, 1927, reducing the base rate to 50 cents. The commission approved tentatively and continued investigation.

The Citizens Gas Company, similarly authorized, installed a distribution system and, in October, 1928, commenced furnishing natural gas to consumers in Shelby. Its schedule, specifying a base rate of 35 cents, was approved by the commission. Within a brief period many of appellee's customers left it and have since obtained their gas from the other company. In November appellee filed and, though the commission did not approve, put in force a

*All schedules referred to in the opinion similarly specify step rates and are conveniently identified by the highest or base rate.

schedule specifying a base rate of 20 cents. The commission ordered it to submit evidence as to the reasonableness of such rates. Appellee did not support them as adequate or compensatory, but insisted that under competitive conditions then existing they were justified. And it declared that should the Citizens company meet them it would propose a further reduction.

The commission January 22, 1929, found the 20 cent schedule too low to yield enough to cover reasonable operating expenses including depreciation; that such rates would tend to imperil or impair appellee's ability dependably to serve, held such schedule contrary to the public interest, condemned the 50 cent schedule as unreasonable and prescribed a base rate of 35 cents, being precisely the same as that filed by the Citizens company and approved by the commission. Appellee refused to charge the rates so ordered and sued to enjoin the enforcement of the order upon the ground that the commission was not empowered by statute to prescribe specific rates and that the order violated the state constitution and the due process clause of the Fourteenth Amendment. The trial court gave appellee judgment on the pleadings. July 29, 1930, the supreme court sustained the order, reversed the judgment and remanded the case for further proceedings. 88 Mont. 180, 232.

The Citizens company had filed, January, 1930, and without the commission's approval put in force a schedule naming as a base rate 23 cents but subject to a reduction of 3 cents for prompt payment. The record shows that, notwithstanding appellee's reduction to the base rate of 20 cents and a further reduction September 1, 1931, to a flat rate of 15 cents, its sales of gas decreased from 129 million cubic feet in 1927 to 106 million in 1928, to 73 in 1929, to 67 in 1930, to 58 in 1931. The sales of the Citizens company have correspondingly increased. During the first seven months of 1932, the latest period for which the figures are given, appellee sold less than 40 million cubic feet and the Citizens company sold over 67 million.

December 22, 1930, appellee brought this suit and dismissed the one in the state court. The district court granted a temporary injunction against the enforcement of the order on the ground that, as the utility necessarily lowered its rates for self-preservation, the order prescribing higher rates was unreasonable and repugnant to

the due process clause of the Fourteenth Amendment. In a concurring opinion one of the judges construed the complaint to charge confiscation, and maintained that the order shows that the commission deliberately disregarded the rule entitling public utilities to a fair return and that this, without further evidence, was sufficient ground for temporary injunction. 52 F. (2d) 802, 805. The commission appealed from the interlocutory decree and this court affirmed. 285 U. S. 524. Upon the final hearing, on evidence taken before an examiner, the district court found that the community is insufficient to support, at rates affording fair return, the competing systems; that the prescribed rates deprive appellee of its right of competition and would fail to produce legitimate operating expenses, taxes, depreciation and a fair return upon the value of appellee's property. As its conclusions of law, the court declared the order invalid and that the interlocutory injunction should be made permanent, 1 F. Supp. 328. It so decreed.

The rights conferred upon appellee by the authorizing ordinance are subject not only to the proper exertion of power of the State to regulate its services and rates but also to authority of the city to grant to others the privilege similarly to serve. The city was free to admit other purveyors of gas. *Madera Water Works* v. *Madera*, 228 U. S. 454. *Piedmont Power Co.* v. *Graham*, 253 U. S. 193. *Springfield Gas Co.* v. *Springfield*, 257 U. S. 66, 70. The appellee does not complain that the rates imposed upon it by the order differ from those which have been established and are binding on its competitor. The gravamen of its complaint is that the enforcement of the order will deprive it of the "right of competition in rates essential to protection and preservation of its property and business" and of the "right to charge rates concededly less than reasonable rates". The demand for gas in the community served is not sufficient to require both systems and there is no suggestion that it is likely to become great enough to justify the expenditures made for them. The facts disclosed by the record compel the conclusion that, if competition shall continue in the future as in the past, appellee will not be able upon any rates within constitutional protection against reduction to earn a reasonable return upon the value of its property employed in the public service. The due process clause of the Fourteenth Amendment safeguards against the taking of private property, or the

compelling of its use, for the service of the public without just compensation. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 410. *Smyth* v. *Ames*, 169 U. S. 466, 546. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 41. *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 347. *The Minnesota Rate Cases*, 230 U. S. 352, 434. *Board of Commrs.* v. *N. Y. Tel. Co.*, 271 U. S. 23, 31. But it does not assure to public utilities the right under all circumstances to have a return upon the value of the property so used. The loss of, or the failure to obtain, patronage due to competition does not justify the imposition of charges that are exorbitant and unjust to the public. The clause of the Constitution here invoked does not protect public utilities against such business hazards. *Reagan* v. *Farmers' Loan & Trust Co., supra*, 412. *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578, 596. *Smyth* v. *Ames, supra*, 544-545. *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 446. *Darnell* v. *Edwards*, 244 U. S. 564, 569-570. *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447, 448.

But appellee, having undertaken to serve under conditions permitting competition, now insists that it has a constitutional right by unrestrained cutting of rates to destroy the competitor. And for that purpose it has made reductions from the 60 cent schedule in force until shortly before the Citizens company entered the field to the flat rate of 15 cents which yields less than the necessary cost of the service. The commission found that the rates specified in the 20 cent schedule are too low, unreasonable, liable to impair the service and contrary to the public interest. The decision of the state supreme court is to the same effect. 88 Mont. 180, 218. The facts disclosed by the record are not sufficient to show that the exertion by the commission of its power to prescribe specific rates was arbitrary or an infringement of any constitutional right of the appellee. See *Stephenson* v. *Binford*, 287 U. S. 251, 273 *et seq.* *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 525. *Town of Mapleton* v. *Iowa P. S. Co.*, 209 Ia. 400, 404, 407. *Economic Gas Co.* v. *Los Angeles*, 168 Cal. 448, 450. *Community Natural Gas Co.* v. *Natural Gas & Fuel Co.*, 34 S. W. (2d) 900, 902. *City of Farmersville* v. *Texas-Louisiana Power Co.*, 55 S. W. (2d) 195, 200.

The appellee contends that the rates prescribed by the order are so unreasonably low as to deprive it of just compensation. The

appellants maintain that no such question is presented by the record. The complaint was grounded upon the claim, not that the rates were too low but, that the order prevented appellee from charging lower ones. It prayed judgment that it be allowed to charge less than the rates prescribed in the order. After the evidence was taken appellee proposed an amendment. It merely alleged that the rates prescribed "are not sufficient to furnish plaintiff a fair or any return on the value of its gas plant or system and such rates, if made effective, would confiscate and deprive this plaintiff of its property" without due process of law. Appellee here admitted that its purpose in asserting the belated claim that the rates specified in the order are too low was not that it might collect more for its services but that it might continue, once the order was set aside, to serve at a loss and so if possible force the other company out of the field. It is a well-established rule that an allegation merely asserting in general language that rates are confiscatory is not sufficient and that, in order to invoke constitutional protection, the facts relied on must be specifically set forth and from them it must clearly appear that the rates would necessarily deny to plaintiff just compensation and deprive it of its property without due process of law. *Aetna Insurance Co.* v. *Hyde, supra,* 447. This allegation is not sufficient.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.